Supreme Court, U.S.
FILED

03 658 OCT 28 2003

No. _____

In the Supreme Court of the United States

JOHN DEEP,

Petitioner

v.

THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INCORPORATED, *ET AL.*,

Respondents

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

John Deep
26 Roosevelt Blvd.
Cohoes, NY 12047
(518) 233-0225

Petitioner, pro se

QUESTIONS PRESENTED

The court below decided Petitioner provided Internet service that was "obviously" capable of noninfringing uses, App. 13a, since the general public could:

> [C]ommunicate directly with all [their] buddies when [] they are online, attaching to [their] communications (which are really just emails) any files that [they] want[] to share with the buddies. All communications back and forth are encrypted by the sender by means of encryption software furnished by Aimster [] and are decrypted by the recipient using the same [].

App. 4a. (Posner, J.) But noting some evidence of infringing use, the court affirmed a broad preliminary injunction, which had the effect of shutting down Petitioner's Internet service. In doing so, the court below disagreed squarely with Ninth Circuit law of contributory infringement, App. 10a, while recognizing that this Court "must have the last word." App. 6a. Thus, the issues of law presented are:

1. Whether, under the Copyright Act and this Court's decision in *Sony*, Petitioner's provision of Internet service, obviously capable of noninfringing use, constitutes *per se* contributory infringement if there is some evidence of infringing use; and

2. If so, whether, or to what extent, a court may use its power under the Copyright Act's injunction clause to order Petitioner affirmatively to monitor and prohibit Internet communications and file attachments (encrypted by the sender and decrypted by the recipient), consistent with the Copyright Act's fair-use clause, and also with: (a) the First Amendment's speech, press and association clauses; (b) the Fifth Amendment's takings clause; and (c) the safe harbor clause of the Digital Millennium Copyright Act.

LIST OF PARTIES

John Deep, *Petitioner*,

v.

Recording Industry Association of America, Incorporated, *et al.*, *Respondents*, viz.:

Zomba Recording Corporation, Caroline Records, Incorporated, EMI Christian Music Group, Incorporated, Narada Productions Incorporated, Noo Trybe Records, Inc., Forefront Communications Group, Priority Records, Sony Discos, Inc., UNG Recordings, Inc., BMG Music doing business as RCA Label, Motown Record Company, Loud Records, Hollywood Records, Sony Music Entertainment Inc., Capital Records, Inc., Artista Records, Inc., Interscope Records, Virgin Records America, Inc., BMG Music doing business as Wynham Hill, BMG Music doing business as BMG Entertainment, Bad Boy Records, LaFace Records, A & M Records, Inc., Geffen Records, Inc., Island Records, Inc., MCA Records, Inc., Polygram Records, Inc., Universal Records, Inc., Motion Picture Association of America, Columbia Pictures Industries, Inc., Disney Enterprises, Inc., et al.

The same parties appear in the docket of the court below.

TABLE OF CONTENTS

QUESTIONS PRESENTED I

LIST OF PARTIES II

TABLE OF CONTENTS III

TABLE OF AUTHORITIES V

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. The background of the litigation 3

B. The decision of the court below 6

C. The status of the litigation 7

D. The harm of the broad injunction 7

REASONS FOR GRANTING THE PETITION 8

I. The opinion below apparently conflicts with this Court's opinion in *Sony* 10

A. The court below decided that Aimster was obviously capable of noninfringing use 11

B. The court below noted some evidence of infringing use and concluded there was contributory infringement 13

C. The court below relies on clear error 16

D. The court below alters the traditional contours of copyright protection 19

II. This Court's opinion in *Sony* may be ripe for review and has become a source of great controversy 20

III. The decision below to enjoin is premised upon prior Supreme Court opinions whose implications regarding the public interest in Internet service are in need of clarification 21
A. Overbroadness and Fair Use 22
B. First Amendment Challenge 23
C. Fifth Amendment Takings Challenge 26

IV. The question presented of construction of a statute, the Digital Millennium Copyright Act, is of first impression and the decision below hinders administration of the Act 28

CONCLUSION 30

APPENDICES

TABLE OF AUTHORITIES

Cases

A&M v. Napster,
239 F.3d 1004 (9th Cir. 2001).....6, 20, 29

ACLU v. Johnson,
194 F.3d 1149, (10th Cir. 1999).....25

Armstrong v. United States,
364 U.S. 40, 80 S. Ct. 15634, L. Ed. 2d 1554 (1960).....27

Buckley v. Am. Constitutional Law Foun., Inc.,
525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999).....25

BuddyUSA v. Recording Industry,
21 Fed. Appx. 52, (2nd Cir. 2001). 4

Campbell v. Acuff-Rose Music, Inc.,
510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994).....23

Dolan v. City of Tigard,
512 U.S. 374, 114 S. Ct. 2309,
129 L. Ed. 2d 304 (1994).....27, 28

Eldred v. Ashcroft,
537 U.S. 186, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003).....24

In re: Aimster Copyright Litigation,
177 F. Supp. 2d 1380, (J.P.M.D.L 2001).....4

In re: Aimster Copyright Litigation,
252 F.Supp 634 (N.D.Ill 2002) .....*passim*

In re: Aimster Copyright Litigation,
334 F.3d 643 (7th Cir. 2003).....*passim*

McIntyre v. Ohio Elections Comm.,
514 U.S. 334, 115 S Ct. 1511, 131 L. Ed. 2d 426 (1995).....25

Reno v. ACLU,
521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).....26

Sony v. Universal,
464 U.S. 417, 104 S. Ct. 774,
78 L. Ed. 2d 574 (1984).....*passim*

SunTrust Bank v. Houghton Mifflin Co.,
268 F.3d 1257 (11th Cir. 2001).....23

Vault Corp. v. Quaid Software, Ltd.,
847 F.2d 255 (5th Cir. 1988).....30

Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton,
563 U.S. 150, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (2002).....25

Weinberger v. Romero-Barcelo,
456 U.S. 305, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982).....23

* * * * * * * * * *

Constitutional and Statutory Provisions

U.S. Const., art. I, § 8, cl. 8.....10

U.S. Const., amend. I. 23-25

U.S. Const., amend. V. 26-28

17 U.S.C. §§ 101. 22

17 U.S.C. §§ 106. 22

17 U.S.C. §§ 107. 22

17 U.S.C. §§ 411. 22

17 U.S.C. §§ 501. 22

17 U.S.C. §§ 502(a).....22

17 U.S.C. §§ 504. 22

17 U.S.C. §§ 512. 28-29

* * * * * * * * * *

Other Authorities

Paul Goldstein, *Copyright* (2d ed. 2003).....9, 20

Randal C. Picker,
"Copyright as Entry Policy:
The Case of Digital Distribution,"
47 Antitrust Bull. 423, 424 (2002).....19

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 334 F.3d 643. The opinion of the district court (App. 24a) is reported at 252 F. Supp 634, and the preliminary injunction order of the district court (App. 82a) is unreported.

JURISDICTION

The court of appeals' judgment was entered June 30, 2003. On September 22, 2003, Justice Stevens granted Petitioner's Application for Extension of Time to File Petition for Writ of Certiorari to November 27, 2003. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Patent and Copyright Clause confers upon Congress the Power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I, § 8, cl. 8.

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble . . . ." Id., amend. I.

The Fifth Amendment provides, in pertinent part, that "Private property shall not be taken for public use without just compensation." Id., amend. V.

This case involves several provisions of the Copyright Act of 1909, the Copyright Revision Act of 1976 (the "Copyright Act"), and the Digital Millennium Copyright Act of 1998 (The "DMCA"), respectively, each of which is printed in full in Appendices D-F hereto (App. 86-105a.).

The pertinent provisions of the 1976 Act are *17 U.S.C. § § 101* (portions), 106, 107, 411, 501, 502(a) and 504. The pertinent section of the 1909 Act is former *17 U.S.C. § 1* (portions). The pertinent provision of the DMCA is *17 U.S.C. § 512*.

STATEMENT

John Deep, *Petitioner*, studied classical music performance at Harvard (B.A. '79), and is an author of seven books and of more than a dozen CD-ROM software products, whose work merging audio and video with e-books for education received the *Smithsonian Award for Innovation* in 1998, App. 121a; and also, an innovator featured in the *Sunday Washington Post*, Feb. 25, 2001, p. A1, App. 106a, and named one of *Time Magazine's Innovators of the Year in Music* in 2001, TIME MAGAZINE, May 28, 2001, P. 73, for his creation of *Aimster*; and recently, a provider of Aimster Internet service, incorporated as a venture for online retail of music and movies, with various co-shareholders including *First Albany Corp.*, App. 111a, and *TransWorld Entertainment, Corp.*, one of the largest specialty retailers of compact discs, prerecorded audio cassettes, prerecorded videocassettes, digital versatile discs (*"DVDs"*) and related products in the United States, with sales of $1.41 billion. *TransWorld Entertainment Corp. Annual Report, 10K, May 4, 2001 at "Business: General, Branding"*

Petitioner, whom the court below called "Aimster," App. 2a, developed the Internet service at issue ("Aimster Internet service") in August 2000 and entered into an online retail venture with TransWorld Entertainment in late January 2001, see App 74-75a, which included corporations BuddyUSA, Inc. and AbovePeer, Inc. (the "Corporations"), App 26a.

Petitioner prays that in the present case this Court may hear other authors, innovators and providers similarly situated to Petitioner.

Respondents are the Recording Industry Association of America, Inc., *et al.*, numerous plaintiffs, who among them, as the court below said, appear to own most subsisting copyrights on American popular music, App. 2a.

A. The background of the litigation

This is an action for alleged infringement of statutory copyright, and is a consolidation of multiple lawsuits ordered by the Judicial Panel on Multi-District Litigation pursuant to 28 U.S.C. § 1407. The district court had subject matter jurisdiction over the matter pursuant to 28 U.S.C. §§ 1331, 1338.

Declaratory relief. As the district court described, "The rattling of legal sabers began on April 3, 2001, according to Deep, two weeks after a senior executive for Transworld Entertainment Corp., a retailer of musical recordings, contacted Edgar Bronfman of Vivendi/Universal about the possibility of Transworld selling musical recordings through Aimster under a license from the major record companies." App. 75a. On April 3, Petitioner and the Corporations received a cease and desist letter from Respondents alleging contributory infringement. App. 75a.

Petitioner urged the shareholders that the Corporations sue for declaratory relief in the Northern District of New York, and request an expedited *evidentiary hearing*. The Corporations did sue for relief in April 2001 and requested the *evidentiary hearing* in May 2001. App 112-13a.

Respondents Enjoined. Respondents moved to dismiss the complaint for declaratory relief, May 30, 2001, but the district court in New York denied their motion, June 22, 2001. App. 115a, 118a. The district court in New York also enjoined eighteen Respondents – "and those acting in concert with them" – from prosecuting or participating in any

other actions "relating to any claims for copyright infringement or related state claims involving the operation of the Internet service known as Aimster." App. 114a.

Multiple Actions. Certain Respondents subsequently sued Petitioner personally (and the Corporations), filing 6 actions in all, three in the Second Circuit (S.D.N.Y.), and one each in the Sixth Circuit (M.D.Tenn.), the Ninth Circuit (C.D.Ca.) and the Eleventh Circuit (S.D.Fla.). Respondents also appealed to the Judicial Panel on Multi-District Litigation ("M.D.L."). *In re: Aimster Copyright Litigation*, 177 F. Supp. 2d 1380, (J.P.M.D.L . 2001). ("M.D.L. Transfer")

Second Circuit Appeal: Respondents also requested expedited appeal to the Second Circuit Court of Appeals, but that court summarily affirmed the district court's decision, *BuddyUSA v. Recording Industry*, 21 Fed. Appx. 52, (2nd Cir. 2001). ("We have considered all of the claims raised by the Recording Industry, and we find them to be without merit.")

Evidentiary Hearing Scheduled. Petitioner asked the district court (N.D.N.Y.) for an *evidentiary hearing* concerning the anti-competitive multiple actions brought by Respondents, and a hearing was scheduled for August 3, 2001, App. 119a, Docket #40. However, on July 18, the district court stayed all proceedings, pending the M.D.L. decision. App. 119a, Docket #47.

M.D.L. Transfer. In November 2001, the M.D.L. granted jurisdiction, see M.D.L. Transfer, and transferred to the Seventh Circuit ("the court below") in the Northern District of Illinois ("the district court").

Motion for Preliminary Injunction. *On December 21, 2001*, for the first time in any action, and after a delay of seventeen months, Respondents moved for preliminary injunctive relief. App. 74a ¶ 2.

District Court Decision. Petitioner requested discovery of Respondents' anti-competitive actions and again requested an *evidentiary hearing*. But on July 18, the district

court denied Petitioner the *evidentiary hearing*, App. 43a, and on September 4, 2002, granted an injunction and ordered Respondents to draft the injunction, App. 81a, and then adopted Respondents' language for a broad injunction verbatim. App. 82a.

Attorney Withdraws. Petitioner did not disclose details of his venture with TransWorld Entertainment until November 2002, when the district court granted his attorney's motion to withdraw (which cited potential conflict of interest), after denying the attorney's first motion. But once this key evidence came to light, certain speculative statements of the district court were proven to be plain error, namely: (1) "At issue is a service whose very *raison d'etre* appears to be the facilitation of and contribution to copyright infringement on a massive scale." App. 24a. (2) "Defendants manage to do everything but actually steal the music off the store shelf and hand it to Aimster's users" App. 53a

Instead, Petitioner proved that he did everything *solely to sell* music from the shelves of his co-shareholder TransWorld, his very *raison d'etre* to promote the online retail venture of music and movies, as a review of the record shows. Indeed, Petitioner submitted the actual TransWorld exclusive licensing agreement, (in which TransWorld is referrd to as the "Purchaser") and some important provisions are:

> **Scope:** Aimster will develop a customized version of the software, and the Content is defined as "music, movies and videogames."
>
> **Absolute Right to Permit File-Sharing:** File-sharing "shall not be deemed to violate the Purchaser's exclusive rights."
>
> **Right to Use and Exclusivity:** TransWorld will have the exclusive right both to sell Content and to "exclusive hosting."

First Report of Compliance, November 12, 2002. Fortunately, on appeal the court below had before it a clear record of Petitioner's relationship with TransWorld, and did not appear to adopt the most egregious of the district court's plain error. Of course, this Court would have the same clear record for review.

Appeal. Petitioner provided Internet service to the general public, a number estimated in the millions. App. 107a. But the broad injunction granted had the effect of shutting down the Aimster Internet service entirely, App. 2a. On November 26, even without counsel, Petitioner appealed *pro se*,[1] and requested an emergency stay of the unprecedented overbroadness of the injunction. However, the court below denied the stay and affirmed the grant of injunction in its opinion published on June 30, 2003, *In re Aimster*, 334 F.3d 643 ("*In re Aimster*").

B. The decision of the court below

The court below decided that Petitioner was a provider of Internet service, which it said was "obviously" capable of non-infringing use. App. 13a.

Further, upon noting some evidence of infringing use, App. 3a, 11a, the court below disagreed squarely with Ninth Circuit law of contributory infringement, *A&M v. Napster*, 239 F.3d 1004 (9th Cir. 2001) ("*Napster*"), App. 10a, while "recognizing of course that the Court must have the last word." App. 6a.

But the court below then clearly ruled that it was necessarily Petitioner's burden to produce evidence of the "respective magnitudes" of uses, App. 11a, and concluded that, until Petitioner produced such evidence, "We have to

---

[1] Once the Notice of Appeal was filed, the firm of Stoll, Keenon and Park fortuitously agreed to brief and argue the appeal. Similarly, Petitioner may yet engage counsel in this Court once this Petition is filed.

assume for purposes of deciding this appeal that no such evidence exists." App. 18a.

The court below thus affirmed, in apparent conflict with this Court's opinion in *Sony v. Universal*, 464 U.S. 417 *("Sony")*, both the district court finding of "an exceptionally strong likelihood," App. 80a, of *per se* contributory infringement and the broad preliminary injunction, App. 23a; and in effect the court below affirmed, too, the district court's denial of an *evidentiary hearing*. App. 20a.

C. The status of the litigation

The decision of the court below affirmed the injunction to shut down Aimster Internet service, and imposed on Petitioner the burden to produce evidence of the actual noninfringing use of Aimster Internet service. However, while Aimster Internet service is shut down, Petitioner is precluded from obtaining the very evidence he needs to produce.

A related issue was raised early on, when at the beginning of oral argument on the preliminary injunction the district judge asked *sua sponte*, "And I don't suppose that there's any way we can convert this hearing into a hearing on a permanent injunction [ ]?" App. 121a. Petitioner asked counsel to object that there had been no *evidentiary hearing*; counsel did so.

Regardless, Petitioner having been precluded from producing needed evidence by the injunction itself, the preliminary injunction becomes permanent, save this Court avails Petitioner of his last resort, writ of *certiorari*.

D. The harm of the broad injunction

Petitioner intends to submit separately with the Court's indulgence a Motion to Stay or Expedite in this Court that provides the background of the extraordinary harm of the broad injunction.

But in summary, the injunction affirmed by the court below despite Petitioner's objection to its unprecedented overbroadness (and his attempts to stay enforcement) continues severely to harm Petitioner's ability personally to deliver *any* software or provide *any* Internet service *to anyone* – lest that party be considered his agent or licensee, and thus, caught up in the broad injunction. This severe harm to Petitioner, named personally, continues even though the Corporations are in liquidation, and – though "not discussed" by the court below, App. 1a – the harm may also exceed the bounds of limited liability, because Petitioner was indemnified as an officer of the Corporations.

Now, because of the consequences of the injunction, Petitioner has been forced into personal reorganization (under Chapter 13) – but the harm of the broad injunction threatens even the feasibility of that reorganization plan. The result becomes self-fulfilling: the harm of the broad injunction in effect threatening Petitioner's ability and his right (likewise the right of other authors, innovators and providers) to be heard by this Court on the issue of that very harm.

Petition for Rehearing, Writ of Certiorari. Due to insolvency Petitioner was unable to engage counsel to file his *Petition for Rehearing*. But Justice Stevens granted (on September 22, 2003) Petitioner's *Application for Extension of Time to File Petition for Writ of Certiorari* to November 27, 2003, and so, by the grace of this Court, this *Petition for Writ of Certiorari* is timely filed.

REASONS FOR GRANTING THE PETITION

Conflict with *Sony*. Petitioner seeks writ of *certiorari* to resolve the apparent conflict of the court below with this Court's precedent in *Sony*. Petitioner contends the court below decided that the provision of an Internet service

constitutes *per se* contributory infringement if there is some evidence of infringing use – or else imposed an unprecedented burden to produce evidence of respective magnitudes of uses of Internet service; further, the court below candidly alters the traditional contours of secondary liability. However, as this Court recognized in *Sony*, to impose secondary liability expansively would permit a single copyright holder to hold entire new industries hostage, *Sony*, 464 U.S. at 421, 440-42, 446.

Ripe for review. Indeed, Judge Posner writing the opinion below recognizes, too, that the issue of potential liability for contributory infringement could result in the shutting down of Internet service or its annexation by the copyright holder, App. 9a – and explicitly recognizes that this Court must have the last word, App. 6a. Thus, this Court's opinion in *Sony* may very well be ripe for review in the present case.

Great controversy. Most notably, Judge Posner cites copyright scholar Paul Goldstein for support when disagreeing squarely with Ninth Circuit law interpreting *Sony*, App. 10a. At the same time, many more like Petitioner have recently been sued personally by Respondents in courts all over the country on the same issue of contributory infringement, App. 122a, and courts everywhere may well need guidance. Thus, this Court's opinion in *Sony* has now become a source of great controversy, both in the scholarly journals and in the federal courts.

Clarification of the public interest in Internet service. The court below also affirmed a broad injunction premised upon prior Supreme Court opinions whose implications regarding the public interest in fair use, free speech and takings of Internet service are in need of clarification.

Construction of new statute. Finally, the decision below to deny safe harbor under the Digital Millennium Copyright Act presents an issue of statutory construction of first impression, as well as a serious hindrance to effective ad-

ministration of the law, affecting the status and property of many.

***In terrorem* effect.** There has been no trial in the present case. Should the decision of the Court of Appeals for the Seventh Circuit stand, there is a real danger that the provision of Internet services will be stifled, due to the *in terrorem* effect of the threat of a lawsuit by parties with the market power of Respondents against authors, innovators, and providers similarly situated to Petitioner.

I. The opinion below apparently conflicts with this Court's opinion in *Sony*

Petitioner endeavors to defend his interests both artistic and economic as author, innovator and provider. However, Petitioner also recognizes that this Court decided unambiguously and correctly in *Sony*,

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Sony, 464 U.S. at 429; U.S. Const., art. I, § 8, cl. 8. In *Sony*, this Court undertook the task of establishing the controlling principles of the doctrine of contributory infringement against a background of judicial restraint and deference to Congress. Most notably, it emphatically rejected the assertion that merely "supplying the 'means' to accomplish an infringing activity" is sufficient to establish liability for the infringements of another. *Id.* at 436. As the Court recog-

nized, to impose secondary liability so expansively would permit a single copyright holder to hold entire new industries hostage and to veto important technological innovations, a result that would be both unfair and economically inefficient. *Id.* at 421, 440-42, 446.

This Court further said, "From its beginning, the law of copyright has developed in response to significant changes in technology." *Id.* at 430. Petitioner's Aimster Internet service is just such a significant change in technology, one that builds upon features of the Sony VTR a new scrambling technology that this Court had already envisioned in *Sony* but that had not yet been implemented. See, *e.g.*, *Id.* at 494. Aimster further builds innovative communications technology into Internet service. App. 4a.

While the court below recognized that Aimster Internet service was "obviously" capable of many non-infringing uses, App. 13a, 16-17a, it nonetheless imposed duties on Petitioner not found in this Court's opinion in *Sony*, and decided that, unless those duties are fulfilled, the provision of Internet service constitutes *per se* contributory infringement if there is some evidence of infringing use.

A. The court below decided that Aimster was obviously capable of noninfringing use

The court below decided that Petitioner (referring to him as "Aimster" or "Deep") was a provider of Internet service since any of the general public could:

> [D]ownload[] the software from Aimster's Web site and then register[] on the system [ ] Having done so, he can designate any other registrant as a "buddy" and can communicate directly with all his buddies when he and they are online, attaching to his communications (which are really just emails) any files that he wants to share with the buddies.

App. 4a. The opinion below also describes five of its own examples of noninfringing use that Aimster is capable of:

> 1. Not all popular music is copyrighted. Apart from music on which the copyright has expired [], startup bands and performers may waive copyright in the hope that it will [] create a following that they can convert to customers of their subsequent works.
>
> 2. A music file-swapping service might increase the value of a recording by enabling it to be used [] in the music-sharing community [].
>
> 3. Users of Aimster's software might form select [] "buddy" groups to exchange non-copyrighted information about popular music, or for that matter to exchange ideas and opinions about wholly unrelated matters as the buddies became friendlier. Some of the chat-room messages that accompany the listing of music files offered or requested contain information or opinions concerning the music; to that extent, though unremarked by the parties, some noninfringing use is made of Aimster's service [].
>
> 4. Aimster's users might appreciate the encryption feature because as their friendship deepened they might decide that they wanted to exchange [] forms of expression that people like to keep private, rather than just copyrighted music.
>
> 5. Someone might own a popular-music CD that he was particularly fond of, but he had not downloaded it into his computer and now he finds himself out of town but with his laptop and he wants to listen to the CD, so he uses Aimster's service to download a copy. This might be a fair use rather than a copyright infringement, by analogy to the time shifting approved as fair use in the Sony case. []
>
> App. 16-17a.

B. The court below noted some evidence of infringing use and concluded there was contributory infringement

The opinion below explained that the principal issue dividing the parties was left undecided in this Court's opinion in *Sony*:

> The Supreme Court made clear in the Sony decision that the producer of a product that has substantial noninfringing uses is not a contributory infringer merely because some of the uses actually made of the product (in that case a machine, the predecessor of today's videocassette recorders, for recording television programs on tape) are infringing. How much more the Court held is the principal issue that divides the parties; and let us try to resolve it, recognizing of course that the Court must have the last word.

App. 6a. But thereafter, the opinion apparently conflicts with this Court's opinion in *Sony* by deciding that it is not enough that

> since the Supreme Court distinguished [ ] between actual and potential noninfringing uses, all Aimster has to show in order to escape liability for contributory infringement is that its file-sharing system *could* be used in noninfringing ways, which obviously it could be.

App. 13a. [Emphasis in original.] Thus, the court below decides that Petitioner's Internet service is "obviously" capable of noninfringing use. But the court below also decides that a showing that Internet service is capable of noninfringing use – or even in the present case, "obviously" capable – "is not enough."

> All five of our examples of actually or arguably noninfringing uses of Aimster's service are possibilities, but as should be evident from our earlier discussion the question is how probable they are. It is not enough, as

> we have said, that a product or service be physically capable, as it were, of a noninfringing use.

App. 17a. Instead, the court decides that "the question is how probable" the non-infringing use is. But having decided that the question is how probable the non-infringing use is, the court below next imposes a novel and substantial burden to show an "estimate of the respective magnitude" of the uses.

> What is true is that when a supplier is offering a product or service that has noninfringing as well as infringing uses, some estimate of the respective magnitudes of these uses is necessary for a finding of contributory infringement.

App. 11a. Thus, the court decides that Petitioner has this "necessary" burden under the following condition: "where a supplier is offering a product or service that has noninfringing as well as infringing uses" – in short, *if there is some evidence of infringing use.*

The court also clarifies its decision by stating that Petitioner's "necessary" burden – to show an "estimate of the respective magnitudes" if there is some evidence of infringing use – is a kind of "burden-shifting." Thus, the court again restates its earlier imposition of a novel and substantial burden: *if there is some evidence of infringing use,* then "the burden of production" is shifted "to Aimster to demonstrate that its service has substantial noninfringing uses." App. 15a.

Of course, by now on purely technical grounds, the court's decision must already be reached, because Petitioner has had little or no opportunity to produce evidence, certainly not a sufficient opportunity to demonstrate the "estimate of respective magnitudes" of infringing and noninfringing uses, assuming such evidence is available at an early stage in development.

Indeed, the court below concludes that Petitioner has not provided *any* evidence of actual noninfringing use at all:

> Aimster has failed to produce any evidence that its service has ever been used for a noninfringing use, let alone evidence concerning the frequency of such uses.

App. 17a. Thus, the court below reaches its decision on the technical grounds that since Petitioner has not presented *any* evidence: "We have to assume for purposes of deciding this appeal that no such evidence exists." App. 18a.

But Petitioner did repeatedly *seek* the opportunity to produce evidence, as early as April 2001, in his declaratory relief in the Northern District of New York, and again in the Northern District of Illinois, in June 2002. However, Petitioner's first request was stayed pending the decision of the Judicial Panel on Multidistrict Litigation, App. 119a, and his second request was denied, App. 43a. Moreover, the district court issued its preliminary injunction even though Petitioner had little opportunity to produce evidence in the proceeding other than "a detailed declaration," App. 26a, footnote 2.

In spite of these facts, the court below also decides that an evidentiary hearing was *not needed* prior to the issuing of the preliminary injunction. App. 20a.

In sum, the court below clearly decided that Internet service constitutes *per se* contributory infringement if there is some evidence of infringing use – unless the provider of Internet service meets the substantial burden to produce evidence of the respective magnitudes of its uses, *no matter if* (as in the present case) Internet service is obviously capable of noninfringing use; if it is entirely new and there has been little time for its various noninfringing uses to be developed or discovered; if it may be impractical to produce such evidence (because the service offers encryption);

and finally, even if the opportunity to produce such evidence has been requested and denied.

Therefore, the court below presents the clear issues of law in apparent conflict with this Court's opinion in *Sony*: (1) whether Petitioner's provision of Internet service, obviously capable of noninfringing use, constitutes *per se* contributory infringement if there is some evidence of infringing use; and (2) if so, whether a broad preliminary injunction should issue. Again, the decision to grant a preliminary injunction while denying a hearing also appears to conflict with this Court's opinion in Sony. This Court decided to deny *permanent* injunctive relief only *after* a lengthy trial, *Sony*, 464 U.S. at 419, 425.

A sub-issue is whether there was sufficient evidence of infringing use, because the court below appears merely to assume that infringing use occurs, without citing to any actual evidence, see e.g. App. 3a.

C. The court below relies on clear error

The court below relies on clear error when it concludes: "Aimster has failed to produce any evidence that its service has ever been used for a noninfringing use, let alone evidence concerning the frequency of such uses." App. 17a. In reaching this conclusion it relies on a finding of the district court that said:

> [D]efendants here have provided no evidence whatsoever (besides the unsupported declaration of Deep) that Aimster is *actually* used for any of the stated noninfringing purposes. Absent is any indication from real-life Aimster users that their primary use of the system is to transfer non-copyrighted files to their friends or identify users of similar interests and share information. Absent is any indication that even a single business without a network administrator uses Aimster to exchange business records as Deep suggests.

App. 18-19a, 55a. [Emphasis in original.] However, the district court (and hence the court below) simply erred in ignoring the evidence that Petitioner submitted – even as early as his first request for an evidentiary hearing on May 2001 in the Northern District of New York. With that request Petitioner submitted a declaration from real-life Aimster user *Sanford Rosenblum*, in which Rosenblum attested at that time that he used Aimster primarily in his law enterprise, App. 114a. The record of the New York court became part of the record of the district court on November 29, 2001, when it was transferred there, pursuant to the Multidistrict Order. App. 120a. A review of the record will show that yet more evidence of substantial non-infringing use was indeed presented.

A second clear error is that the court below relies on what it calls "the invitation to infringement that the Supreme Court found was missing in *Sony*." App. 15a. But the court identifies this invitation to infringement as a "tutorial," App. 15a. However, the tutorial cited shows *how to play music*, and further it was written by anonymous public and posted anonymously to Petitioner's Web site. The court below simply overlooks these facts. A tutorial on *how to play music*, written and posted anonymously, plainly does not represent any invitation *by Petitioner* to infringe.

The court also cites as an invitation to infringe "Club Aimster." App. 15a. But again this club merely provides access to reviews of music that fans might want to buy in the online retail venture, and to a list of its own prediction of popular music, the "Top 40." Indeed, elsewhere the court itself describes Petitioner's club as *one of its own non-infringing examples*:

> Some of the chat-room messages that accompany the listing of music files offered or requested contain information or opinions concerning the music; to that extent, though unremarked by the parties, some

> noninfringing use is made of Aimster's service, though it is incidental to the infringement.

App. 17a. Yet simultaneously the court also deems the club itself as an invitation to infringe.

Because the court below conceded that the fan club is an axiomatic fair use, it thus erred in finding that the same *axiomatic fair use was also an element of contributory infringement.* If that were the law, then any provider of two Internet services (or more), each an axiomatic fair use, might still be guilty of contributory infringement merely because of the cumulative effect. One fair use might always appear to advertise infringement for the other.

To make an analogy to Sony and its Betamax VTR: suppose Sony had innovatively developed the BetaRatings to sample popularity of TV shows, competing with the Nielsen ratings; or suppose, in a second example, Sony had developed Club Beta to allow users to review TV shows and charged membership fees for the access to the Club's reviews and ratings. These examples would only serve to show that the Betamax itself was capable of *yet more noninfringing uses.*

Finally, in its description of the club, App. 15a, the court also fails to consider Petitioner's expert analysis of the workings of the fan club, which proves that club merely published daily reviews, and contained direct links only to an online retail site where the music can be legally purchased.

The court below decides that the tutorial and the club would have been objectionable to this Court because:

> Otherwise its opinion would have had no occasion to emphasize the fact (at least the majority thought it a fact--the dissent disagreed, 464 U.S. at 458-59) that Sony had not in its advertising encouraged the use of the Betamax to infringe copyright. Id. at 438.

App. 13a. Petitioner thus contends there is a sub-issue of law here for this Court to decide – whether an axiomatic fair use can also double as an element of contributory infringement. Moreover, these three facts of: (1) Rosenblum's declaration; (2) the tutorial; and (3) the workings of the club are supported by affidavits and documents that are few in number and available for this Court's straightforward review. Petitioner contends that only clear issues of law matter here.

D. The court below alters the traditional contours of copyright protection

Finally, the Seventh Circuit opinion candidly alters the traditional contours of copyright protection law. The court below makes clear that it relies on a theory of contributory infringement derived from the teachings of the Chicago School of Economics:

> Recognizing the impracticability or futility of a copyright owner's suing a multitude of individual infringers, [] the law allows a copyright holder to sue a contributor to the infringement instead, in effect as an aider and abettor.

App. 3a. For support Judge Posner cites a theory by a Chicago School economist that passes critical review on this Court's opinion in *Sony*: "The *Sony* test for contributory copyright infringement—whether the object in question is capable of substantial noninfringing uses—is far too weak and fails to take into account at all the scope of the infringing uses that will result. It is bad third-party copyright policy." Randal C. Picker, "Copyright as Entry Policy: The Case of Digital Distribution," *47 Antitrust Bull. 423, 424 (2002).*

Judge Posner's opinion on contributory infringement also makes clear its reliance on an analogy to tort law:

> Another analogy is to the tort of intentional interference with contract, that is, inducing a breach of contract. [] If a breach of contract (and a copyright license is just a type of contract) can be prevented most effectively by actions taken by a third party, it makes sense to have a legal mechanism for placing liability for the consequences of the breach on him as well as on the party that broke the contract.

App. 3a. [Citation omitted.] But Petitioner finds no such analogy to the tort of intentional interference with contract in this Court's opinion in *Sony*.

II. This Court's opinion in *Sony* may be ripe for review and has become a source of great controversy

Moreover, Judge Posner also suggests in his opinion that the issue of contributory infringement for Internet service (as opposed to a traditional copying device) is of national importance both for the law and the market. Liability for contributory infringement, Judge Posner cautions, "could result in the shutting down of the service or its annexation by the copyright holders." App. 9a.

Thus, Judge Posner implies that this Court's opinion in *Sony* might now be different, based on its review of innovations in Internet service, such as Petitioner's, and therefore ripe for review in the present case.

Most notably, Judge Posner cites copyright scholar Paul Goldstein for support when disagreeing squarely with Ninth Circuit law interpreting *Sony*:

> We therefore agree with Professor Goldstein that the Ninth Circuit erred in *A&M Records, Inc. v. Napster, Inc.*, in suggesting that actual knowledge of specific infringing uses is a sufficient condition for deeming a facilitator a contributory infringer.

App. 10a. [Citations omitted] Petitioner also submits to the Court's attention that many more like Petitioner have recently been sued personally by Respondents on the same issue of contributory infringement, including targets like a 12-year-old honors student from New York and a 66-year-old woman in Boston who said that she had never downloaded music. App. at 122a. The Senate has convened hearings on the propriety of Respondents' litigation, and Sen. Norm Coleman of Minnesota cautions: "I don't want to make criminals out of 60 million kids, even though kids and grandkids are doing things they shouldn't be doing." App. at 124a. Moved now by the great controversy, federal courts everywhere will look to this Court's guidance. Thus, this Court's opinion in *Sony* has now become a source of great controversy, both in the scholarly journals and in the federal courts.

III. The decision below to enjoin is premised upon prior Supreme Court opinions whose implications regarding the public interest in Internet service are in need of clarification

The opinion below assumes without evidence that the general public when using Petitioner's Internet service could be guilty of direct infringement:

> Teenagers and young adults who have access to the Internet like to swap computer files containing popular music. If the music is copyrighted, such swapping, which involves making and transmitting a digital copy of the music, infringes copyright.

App. 3a. But at the same time the opinion below makes clear that the general public could "obviously" be engaged in noninfringing use, both when messaging and copying, and gives five examples of the fair use. App. 13a, 16-17a.

Thus, the issue of whether, or to what extent, the general public is in fact engaged in fair use or in direct infringement becomes especially crucial to determining the breadth of an injunction, and implicates the Copyright Act.

A. Overbroadness and Fair Use

The court below denies Petitioner's objection to the overbreadth of the injunction that issued because it decided the objection was made but not developed:

> Aimster objects to the injunction's breadth. But having failed to suggest alternative language either in the district court or in this court, it has waived the objection. We cannot find a case that makes this point expressly, but it is implicit in the general principle that arguments made but not developed do not preserve issues for appellate review.

App. 22-23a. But the court below fails to consider the public interest, and thus conflicts with this Court's opinion:

> In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction. [] Thus, the Court has noted that "[the] award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff," and that "where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." []

Weinberger v. Romero-Barcelo, 456 U.S. 305, 312-313 (1982). [Citations omitted.] In the present case, there is a colorable fair use defense because the Internet service is obviously

capable of noninfringing use, and the strong public interest in fair use would justify withholding relief. Indeed, this Court in *Sony* cited approvingly the district court's finding in that fair use justified withholding injunctive relief:

> Even if it were deemed that home-use recording of copyrighted material constituted infringement, the Betamax could still legally be used to record noncopyrighted material or material whose owners consented to the copying. An injunction would deprive the public of the ability to use the Betamax for this noninfringing off-the-air recording.

Sony, 464 U.S. at 443. Similarly, the Eleventh Circuit recently withheld injunctive relief where there was a colorable fair use defense because "the Supreme Court has cautioned that such relief may not be consistent with the goals of copyright law in cases in which the alleged infringer of the copyright has a colorable fair-use defense." *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001); citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10, 114 S. Ct. 1164, 1171 n.10, 127 L. Ed. 2d 500 (1994). Therefore, the overbroadness of the injunction in the present case should be reviewed to protect the public interest in fair use.

B. First Amendment Challenge

The court below noted that Petitioner raised a First Amendment challenge below to the breadth of the injunction, but the court decided:

> We are not impressed by Aimster's argument that the district court had an independent duty, rooted in the free-speech clause of the First Amendment, to make sure that the impact of the injunction on communications over the Internet is no greater than is absolutely necessary to provide the recording industry with the legal protection to which it is entitled while the case

> wends its way to a conclusion. Copyright law and the principles of equitable relief are quite complicated enough without the superimposition of First Amendment case law on them; and we have been told recently by the Supreme Court not only that "copyright law contains built-in First Amendment accommodations" but also that, in any event, the First Amendment "bears less heavily when speakers assert the right to make other people's speeches." *Eldred v. Ashcroft*, 537 U.S. 186, 123 S. Ct. 769, 788-89, 154 L. Ed. 2d 683 (2003).

App. 23a. However, Petitioner understands from the very same opinion of this Court, see *Eldred v. Ashcroft*, 537 U.S. 186, 123 S. Ct. 769, 89, 154 L. Ed. 2d 683 (2003), that first, courts should allow for a First Amendment challenge to copyright protection, *Eldred* at 789 ("We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the *First Amendment.'*") and that second, courts are specifically directed to consider First Amendment challenges if their decision "altered the traditional contours of copyright protection[,]" *Id.*

But the court below does indeed alter the traditional contours of copyright protection, as Judge Posner makes clear both with the opinion's new theory of third party liability derived from the Chicago School of Economics and with its analogy to intentional interference with contract. Now, the newly altered contour of copyright protection may well enjoin too broadly, and thus, as this Court recently teaches, the *First Amendment* bears more heavily when speakers assert the right to make not other people's speeches but their own, *see Id.*

And finally, the court below imposed a duty to monitor – by (necessarily) removing the scrambling of the communications – and thus (necessarily) to prohibit anonymous

speech and association. Even if this were possible (and practical), this Court has recognized that, in some situations, the First Amendment protects a speaker's anonymity. See, e.g., *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 122 S.Ct. 2080, 2090 (2002) (municipal ordinance requiring pamphleteers to disclose names implicates "anonymity interests" rooted in the First Amendment); *Buckley v. Am. Constitutional Law Foun., Inc.*, 525 U.S. 182 (1999) (state requirement forcing petitioners to wear identification badge violated First Amendment because it infringed on petitioners' anonymity); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995) (the right to speak anonymously "exemplifies the purpose behind the Bill of Rights, and the First Amendment in particular").

Further, at least one Circuit has recognized that the First Amendment may protect an individual's anonymity on the Internet. See *ACLU v. Johnson*, 194 F.3d 1149, 1155, (10th Cir. 1999) (First Amendment protects "communicating and accessing information anonymously.") Publishing on Web sites ought also to be protected by the free-press clause.

Significantly, Petitioner's Internet service before its shutdown not only was offered to an estimated millions of the general public, thus larger than all but the very largest service providers, but it also offered the general public a truly innovative service – a scrambled spectrum that itself enables digital communications, in the same way that a spectrum of scrambled frequencies enables telecommunications. The Aimster Internet service similarly enables a spectrum of scrambled networks, and in each network there are: (1) scrambled file attachments secure from intrusion; (2) anonymous associations with buddies; and (3) scrambled messages sent and published as anonymous speech. App. 4a. Thus, Petitioner created file attachments that are family photos, financial documents, recordings of his piano recitals and other valuable digital property;

while certain associations he knows only anonymously through their Aimster identities; and finally, certain of his scrambled messages are crucial trade secrets published only for his colleagues.

But all of these communications are now enjoined. Because once the Aimster scrambled networks are utterly shutdown, Petitioner's scrambled communications and property can no longer be unscrambled; as if an entire spectrum of telecommunication frequencies were suddenly blacked out from the physical universe. So too, for anonymous millions of the general public who relied on Aimster Internet service to create their own communications and property.

C. Fifth Amendment Takings Challenge

The overbroadness challenge to the injunction thus gives rise facially not only to a First Amendment challenge of abridged speech, but on similar grounds to a Takings challenge under the Fifth Amendment – both speech and property were broadly enabled by the Aimster Internet service, and both are now enjoined. Indeed, the Internet is not only a town square for expression, see, e.g., *Reno v. ACLU*, 521 U.S. 844, 853 (1997) ("any person with a phone line can become a town crier"), but similarly an expanse for private property.

But neither that town square nor that expanse shall fall to the exclusive domain of Respondents. Rather, upon that expanse millions of users of Aimster Internet service, including Petitioner, have built up each their own private property. Now, the Takings clause of the Fifth Amendment prevents the government and hence the court below from granting a monopoly over or otherwise taking for public use Petitioner's private property (and in fact, the private property of millions) without just compensation. See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

In the present case, the private property at issue – secure digital property (family photos, financial documents, recordings of Petitioner's own piano recitals), anonymous associations and private messages – has little or no relationship to the benefit of copyright protection sought by the government. As this Court has made clear:

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

Id. at 385. Moreover, the injunction bond (of $500,000) merely compensates (arguably) only for any mistaken loss of Petitioner's Corporations – and only for equitable damages between the private parties. The same private party bond cannot also compensate nor anticipate the loss – from a taking by the government – of millions who, including Petitioner *in personam*, built each their own private property atop Aimster Internet service. As this Court said:

> One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Id., citing *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960). While the strong public desire of the government – or here the court below – to improve the public condition by protecting copyright may be laudable, this Court has said repeatedly:

> [T]here are outer limits to how this may be done. 'A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'

Id. at 396. [Citation omitted.] And finally, even should the government establish a bond for the taking of private property of millions, the administration of justice as public policy simply cannot bear the internal costs of adjudicating millions of takings.

IV. The question presented of construction of a statute, the Digital Millennium Copyright Act, is of first impression and the decision below hinders administration of the Act

In an effort to resolve the public policy issue of injunctive relief of an Internet service provider, it was the express intent of Congress, through the Digital Millennium Copyright Act, to ensure a provider of Internet service safe harbor from broad injunctive relief, and as the court below agreed, Petitioner *does* qualify as a service provider:

> [T]he definition of Internet service provider is broad ("a provider of online services or network access, or the operator of facilities therefore, "17 U.S.C. § 512(k)(1)(B)), and, as the district judge ruled, Aimster fits it.

App. 21a. However, the opinion below then concluded that Petitioner is not protected by any of the safe harbors: "The Act provides a series of safe harbors for Internet service providers and related entities, but none in which Aimster can moor." App. 21a.

The court below reasons: "The Act does not abolish contributory infringement." *Id.* But equally, a court's first impression theory of contributory infringement does not abolish the Act of Congress. In the present case, Petitioner was seeking declaratory relief to clarify the DMCA. App. 113a. (whether Respondents "provide proper notice [] pursuant to the Digital Millennium Copyright Act".) Yet the

court below decided that Petitioner unknowingly failed his safe harbor duties under the DMCA.

The court below makes clear that Petitioner's scrambling technology prevents him from having actual specific knowledge of direct infringement. App. 3a. However, the court below also finds that, as a matter of first impression, "Aimster blinded itself in the hope that by doing so it might come within the rule of the Sony decision." App. 20a. On first impression, then, and in spite of Petitioner's pending request for declaratory relief seeking clarification, the court below deprived Petitioner of safe harbor for having failed the same duties he was seeking to clarify.

The precedent of the court below may deprive other providers of Internet service of their safe harbor, too. As the court forebodes, even the largest provider AOL may unknowingly lose its safe harbor under the DMCA:

> [T]he [AOL] service might find shelter under the Digital Millennium Copyright Act--a question complicated, however, by AOL's intention [ ] of offering an encryption option to the visitors to its chat rooms.

App. 9a. However, the fundamental teaching of *Sony* is that generalized knowledge of infringing uses cannot satisfy the knowledge requirement for contributory infringement where a technology is also capable of substantial noninfringing uses. See *Sony*, 464 U.S. at 439 (finding no precedent to support liability against Sony based "on the fact that they have sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material."); see also *Napster*, 239 F.3d at 1020 (citing *Sony* as rejecting the proposition that "merely supplying the means to accomplish an infringing activity leads to imposition of liability"); *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988) at 262. (software vendor had "actual knowl-

edge that its product is used to make unauthorized copies of copyrighted material").

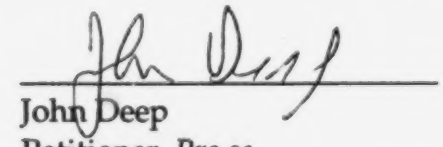
Similarly, in the present case, innovation in Internet service would indeed be hampered if service providers lost their safe harbor whenever they 'constructively' knew that some customers on some occasions would use their service for a purpose that a court later deemed, as a matter of first impression, to be not a fair use but an infringement.

There has been no trial in the present case. Should the decision of the Court of Appeals for the Seventh Circuit stand, there is a real danger that the provision of Internet services will be stifled, due to the *in terrorem* effect of the threat of a lawsuit by parties with the market power of Respondents against authors, innovators, and providers similarly situated to Petitioner.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,



John Deep
Petitioner, *Pro se*

October 28, 2003

APPENDICES

APPENDICES I

A. In re: Aimster Copyright Litigation, 334 F.3d 643, (7th Cir. 2003). 1
B. In re: Aimster Copyright Litigation, 252 F.Supp 634 (N.D.Ill 2002) 24
C. In re: Aimster – Preliminary Injunction Order 82
D. Copyright Revision Act of 1976. 86
E. Copyright Act of 1909. § 1. Exclusive rights as to copyrighted works 92
F. The DMCA Safe Harbor Clause, 17 USCS § 512 (2003) 93
G. The Washington Post, February 25, 2001, Sunday, Pg. A1 106
H. Docket of AbovePeer Inc. v. Recording Industry, *et al,* N.D.NY, the Honorable Lawrence E. Kahn 112
I. Transcript of Proceedings – Oral Argument before the Honorable Marvin E. Aspen, July 24, 2002, 9:45 o'clock a.m., Chicago, Illinois, Page 2:10-25 120
J. List of Books Published 121
K. THE ASSOCIATED PRESS – Elderly man, schoolgirl, professor among file-swapping defendants 122

A. In re: Aimster Copyright Litigation, 334 F.3d 643, (7th Cir. 2003).

No. 02-4125

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

334 F.3d 643; 2003 U.S. App. LEXIS 13229; 67 U.S.P.Q.2D (BNA) 1233; Copy. L. Rep. (CCH) P28,630

June 4, 2003, Argued
June 30, 2003, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 01 C 8933. Marvin E. Aspen, Judge. *In re Aimster Copyright Litig., 252 F. Supp. 2d 634, 2002 U.S. Dist. LEXIS 17054 (N.D. Ill., 2002)*

DISPOSITION: Affirmed.

COUNSEL: For RECORDING INDUSTRY ASSOCIATION OF AMERICA, INCORPORATED, ZOMBA RECORDING CORPORATION, CAROLINE RECORDS, INCORPORATED, EMI CHRISTIAN MUSIC GROUP, INCORPORATED, NARADA PRODUCTIONS, INCORPORATED, Plaintiffs - Appellees: Bradley Rochlen, KATTEN, MUCHIN, ZAVIS, ROSEMAN, Chicago, IL USA. Russell Frackman, MITCHELL, SILBERBERG & KNUPP, Los Angeles, CA.

For JOHN DEEP, Defendant - Appellant: William L. Montague, Jr., STOLL, KEENON & PARK, Lexington, KY USA.

JUDGES: Before POSNER, RIPPLE, and WILLIAMS, Circuit Judges.

OPINIONBY: [*645] POSNER

OPINION:

POSNER, *Circuit Judge*. Owners of copyrighted popular music filed a number of closely related suits, which were consolidated and transferred to the Northern District of Illinois by the Multi-district Litigation Panel, against John Deep and corporations that are controlled by him and need not be discussed separately. The numerous plaintiffs, who among them appear to own most subsisting copyrights on American popular music, claim that Deep's "Aimster" Internet service (recently renamed "Madster") is a contributory and vicarious infringer of these copyrights. The district judge entered a broad preliminary injunction, which had the effect of shutting down the Aimster service until the merits of the suit are finally resolved, from which Deep appeals. Aimster is one of a number of enterprises (the former Napster is the best known) that have been sued for facilitating the swapping of digital copies of popular music, most of it copyrighted, over the Internet. (For an illuminating [**2] discussion, see Tim Wu, "When Code Isn't Law," *89 Va. L. Rev. 679* (2003), esp. 723-41; and with special reference to Aimster, see Alec Klein, "Going Napster One Better; Aimster Says Its File-Sharing Software Skirts Legal Quagmire," *Wash. Post*, Feb. 25, 2001, p. A1.) To simplify exposition, we refer to the appellant as "Aimster" and to the appellees (the plaintiffs) as the recording industry.

Teenagers and young adults who have access to the Internet like to swap computer files containing popular music. If the music is copyrighted, such swapping, which involves making and transmitting a digital copy of the music, infringes copyright. The swappers, who are ignorant or more commonly disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement, are the direct infringers. But firms that facilitate their infringement, even if they are not themselves infringers because they are not making copies of the music that is shared, may be liable to the copyright owners as contributory infringers. Recognizing the impracticability or futility of a copyright owner's suing a multitude of individual infringers ("chasing individual **[**3]** consumers is time consuming and is a teaspoon solution to an ocean problem," Randal C. Picker, "Copyright as Entry Policy: The Case of Digital Distribution," *47 Antitrust Bull. 423, 442 (2002)*), the law allows a copyright holder to sue a contributor to the infringement instead, in effect as an aider and abettor. Another analogy is to the tort of intentional interference with contract, that is, inducing a breach of contract. See, e.g., *Sufrin v. Hosier, 128 F.3d 594, 597 (7th Cir. 1997)*. If a breach of contract (and a copyright license is just a type of contract) can be prevented most effectively by actions taken by a third party, it makes sense to have a legal mechanism for placing liability for **[*646]** the consequences of the breach on him as well as on the party that broke the contract.

The district judge ruled that the recording industry had demonstrated a likelihood of prevailing on the merits should the case proceed to trial. He so ruled with respect to vicarious as well as contributory infringement; we begin with the latter, the more familiar charge.

The Aimster system has the following essential components: proprietary software that can be downloaded

[**4] free of charge from Aimster's Web site; Aimster's server (a server is a computer that provides services to other computers, in this case personal computers owned or accessed by Aimster's users, over a network), which hosts the Web site and collects and organizes information obtained from the users but does not make copies of the swapped files themselves and that also provides the matching service described below; computerized tutorials instructing users of the software on how to use it for swapping computer files; and "Club Aimster," a related Internet service owned by Deep that users of Aimster's software can join for a fee and use to download the "top 40" popular-music files more easily than by using the basic, free service. The "AIM" in "Aimster" stands for AOL instant-messaging service. Aimster is available only to users of such services (of which AOL's is the most popular) because Aimster users can swap files only when both are online and connected in a chat room enabled by an instant-messaging service.

Someone who wants to use Aimster's basic service for the first time to swap files downloads the software from Aimster's Web site and then registers on the system by entering a [**5] user name (it doesn't have to be his real name) and a password at the Web site. Having done so, he can designate any other registrant as a "buddy" and can communicate directly with all his buddies when he and they are online, attaching to his communications (which are really just emails) any files that he wants to share with the buddies. All communications back and forth are encrypted by the sender by means of encryption software furnished by Aimster as part of the software package downloadable at no charge from the Web site, and are decrypted by the recipient using the same Aimster-furnished software package. If the user does not designate a buddy or buddies, then *all* the users of the Aimster system be-

come his buddies; that is, he can send or receive from any of them.

Users list on their computers the computer files they are willing to share. (They needn't list them separately, but can merely designate a folder in their computer that contains the files they are willing to share.) A user who wants to make a copy of a file goes online and types the name of the file he wants in his "Search For" field. Aimster's server searches the computers of those users of its software who are [**6] online and so are available to be searched for files they are willing to share, and if it finds the file that has been requested it instructs the computer in which it is housed to transmit the file to the recipient via the Internet for him to download into his computer. Once he has done this he can if he wants make the file available for sharing with other users of the Aimster system by listing it as explained above. In principle, therefore, the purchase of a single CD could be levered into the distribution within days or even hours of millions of identical, near-perfect (depending on the compression format used) copies of the music recorded on the CD--hence the recording industry's anxiety about file-sharing services oriented toward consumers of popular music. But because copies of the songs reside on the computers of the users [*647] and not on Aimster's own server, Aimster is not a direct infringer of the copyrights on those songs. Its function is similar to that of a stock exchange, which is a facility for matching offers rather than a repository of the things being exchanged (shares of stock). But unlike transactions on a stock exchange, the consummated "transaction" in music files does [**7] not take place in the facility, that is, in Aimster's server.

What we have described so far is a type of Internet file-sharing system that might be created for innocuous purposes such as the expeditious exchange of confidential

business data among employees of a business firm. See Daniel Nasaw, "Instant Messages Are Popping Up All Over," *Wall St. J.*, June 12, 2003, p. B4; David A. Vise, "AOL Makes Instant-Messaging Deal," *Wash. Post*, June 12, 2003, p. E5. The fact that copyrighted materials might sometimes be shared between users of such a system without the authorization of the copyright owner or a fair-use privilege would not make the firm a contributory infringer. Otherwise AOL's instant-messaging system, which Aimster piggybacks on, might be deemed a contributory infringer. For there is no doubt that some of the attachments that AOL's multitudinous subscribers transfer are copyrighted, and such distribution is an infringement unless authorized by the owner of the copyright. The Supreme Court made clear in the *Sony* decision that the producer of a product that has substantial non-infringing uses is not a contributory infringer merely because some of the uses actually [**8] made of the product (in that case a machine, the predecessor of today's videocassette recorders, for recording television programs on tape) are infringing. *Sony Corp. of America, Inc. v. Universal City Studios, Inc.*, *464 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984)*; see also *Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 262-67 (5th Cir. 1988)*. How much more the Court held is the principal issue that divides the parties; and let us try to resolve it, recognizing of course that the Court must have the last word.

Sony's Betamax video recorder was used for three principal purposes, as Sony was well aware (a fourth, playing home movies, involved no copying). The first, which the majority opinion emphasized, was time shifting, that is, recording a television program that was being shown at a time inconvenient for the owner of the Betamax for later watching at a convenient time. The second was "library building," that is, making copies of programs to retain permanently. The third was skipping commercials

by taping a program before watching it and then, while watching the tape, using the fast-forward button on the recorder to skip over the commercials. **[**9]** The first use the Court held was a fair use (and hence not infringing) because it enlarged the audience for the program. The copying involved in the second and third uses was unquestionably infringing to the extent that the programs copied were under copyright and the taping of them was not authorized by the copyright owners--but not all fell in either category. Subject to this qualification, building a library of taped programs was infringing because it was the equivalent of borrowing a copyrighted book from a public library, making a copy of it for one's personal library, then returning the original to the public library. The third use, commercial-skipping, amounted to creating an unauthorized derivative work, see *WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622, 625 (7th Cir. 1982); Gilliam v. American Broadcasting Cos., 538 F.2d 14, 17-19, 23 (2d Cir. 1976)*; cf. *Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1173 (7th Cir. 1997)*, namely a commercial-free copy that would reduce the copyright owner's income from his original program, **[*648]** since "free" television programs are financed by the purchase of commercials **[**10]** by advertisers.

Thus the video recorder was being used for a mixture of infringing and noninfringing uses and the Court thought that Sony could not demix them because once Sony sold the recorder it lost all control over its use. *Sony Corp. of America, Inc. v. Universal City Studios, Inc., supra, 464 U.S at 438*. The court ruled that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses. The question is thus whether the Betamax is

capable of commercially significant noninfringing uses. In order to resolve that question, we need not explore *all* the different potential uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the district court a significant number of them would be non-infringing. Moreover, in order to resolve this case we need not give precise content to the question of how much use is commercially significant. For one potential use of [**11] the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home." *Id. at 441.*

In our case the recording industry, emphasizing the reference to "articles of commerce" in the passage just quoted and elsewhere in the Court's opinion (see *id. at 440*; cf. *35 U.S.C. § 271(c)*), and emphasizing as well the Court's evident concern that the copyright holders were trying to lever their copyright monopolies into a monopoly over video recorders, *Sony Corp. of America, Inc. v. Universal City Studios, Inc., supra, 464 U.S at 441-42* and n. 21, and also remarking Sony's helplessness to prevent infringing uses of its recorders once it sold them, argues that *Sony* is inapplicable to services. With regard to services, the industry argues, the test is merely whether the provider knows it's being used to infringe copyright. The industry points out that the provider of a service, unlike the seller of a product, has a continuing relation with its customers and therefore should be able to prevent, or at least limit, their infringing copyright by monitoring their use of the [**12] service and terminating them when it is discovered that they are infringing. Although Sony could have engineered its video recorder in a way that would have reduced the likelihood of infringement, as by eliminating the fast-forward capability, or, as suggested by the dissent, *id. at 494*, by enabling broadcasters by scrambling their signal to disable the

Betamax from recording their programs (for that matter, it could have been engineered to have only a play, not a recording, capability), the majority did not discuss these possibilities and we agree with the recording industry that the ability of a service provider to prevent its customers from infringing is a factor to be considered in determining whether the provider is a contributory infringer. Congress so recognized in the *Digital Millennium Copyright Act*, which we discuss later in this opinion.

It is not necessarily a controlling factor, however, as the recording industry believes. If a service facilitates both infringing and noninfringing uses, as in the case of AOL's instant-messaging service, and the detection and prevention of the infringing uses would be highly burdensome, the rule for which the recording **[**13]** industry is contending could result in the shutting down of the service or its annexation by the copyright owners (contrary to the clear **[*649]** import of the *Sony* decision), because the provider might find it impossible to estimate its potential damages liability to the copyright holders and would anyway face the risk of being enjoined. The fact that the recording industry's argument if accepted might endanger AOL's instant-messaging service (though the service might find shelter under the Digital Millennium Copyright Act--a question complicated, however, by AOL's intention, of which more later, of offering an encryption option to the visitors to its chat rooms) is not only alarming; it is paradoxical, since subsidiaries of AOL's parent company (AOL Time Warner), such as Warner Brothers Records and Atlantic Recording Corporation, are among the plaintiffs in this case and music chat rooms are among the facilities offered by AOL's instant-messaging service.

We also reject the industry's argument that *Sony* provides no defense to a charge of contributory infringement when, in the words of the industry's brief, there is any-

thing "more than a mere showing that a product may be used for [**14] infringing purposes." Although the fact was downplayed in the majority opinion, it was apparent that the Betamax was being used for infringing as well as noninfringing purposes--even the majority acknowledged that 25 percent of Betamax users were fast forwarding through commercials, *id. at 452 n. 36*--yet Sony was held not to be a contributory infringer. The Court was unwilling to allow copyright holders to prevent infringement effectuated by means of a new technology at the price of possibly denying noninfringing consumers the benefit of the technology. We therefore agree with Professor Goldstein that the Ninth Circuit erred in *A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020 (9th Cir. 2001)*, in suggesting that actual knowledge of specific infringing uses is a sufficient condition for deeming a facilitator a contributory infringer. 2 Paul Goldstein, *Copyright* § 6.1.2, p. 6:12-1 (2d ed. 2003)

The recording industry's hostility to the *Sony* decision is both understandable, given the amount of Internet-enabled infringement of music copyrights, and manifest--the industry in its brief offers five reasons for confining its holding to its [**15] specific facts. But it is being articulated in the wrong forum.

Equally, however, we reject Aimster's argument that to prevail the recording industry must prove it has actually lost money as a result of the copying that its service facilitates. It is true that the Court in *Sony* emphasized that the plaintiffs had failed to show that they had sustained substantial harm from the Betamax. *Id. at 450-54, 456.* But the Court did so in the context of assessing the argument that time shifting of television programs was fair use rather than infringement. One reason time shifting was fair use, the Court believed, was that it wasn't hurting the copyright owners because it was enlarging the audience for their programs. But a copyright owner who can prove in-

fringement need not show that the infringement caused him a financial loss. Granted, without such a showing he cannot obtain compensatory damages; but he can obtain statutory damages, or an injunction, just as the owner of physical property can obtain an injunction against a trespasser without proving that the trespass has caused him a financial loss.

What is true is that when a supplier is offering a product or service that has noninfringing **[**16]** as well as infringing uses, some estimate of the respective magnitudes of these uses is necessary for a finding of contributory infringement. The Court's action in striking the cost-benefit trade-off in favor of Sony came to seem prescient **[*650]** when it later turned out that the principal use of video recorders was to allow people to watch at home movies that they bought or rented rather than to tape television programs. (In 1984, when *Sony* was decided, the industry was unsure how great the demand would be for prerecorded tapes compared to time shifting. The original Betamax played one-hour tapes, long enough for most television broadcasts but too short for a feature film. Sony's competitors used the VHS format, which came to market later but with a longer playing time; this contributed to VHS's eventual displacement of Betamax.) An enormous new market thus opened for the movie industry--which by the way gives point to the Court's emphasis on potential as well as actual noninfringing uses. But the balancing of costs and benefits is necessary only in a case in which substantial noninfringing uses, present or prospective, are demonstrated.

We also reject Aimster's argument that because **[**17]** the Court said in *Sony* that mere "constructive knowledge" of infringing uses is not enough for contributory infringement, *464 U.S. at 439*, and the encryption feature of Aimster's service prevented Deep from knowing what songs

were being copied by the users of his system, he lacked the knowledge of infringing uses that liability for contributory infringement requires. Willful blindness is knowledge, in copyright law (where indeed it may be enough that the defendant *should* have known of the direct infringement, *Casella v. Morris, 820 F.2d 362, 365 (11th Cir. 1987)*; 2 Goldstein, *supra*, § 6.1, p. 6:6), as it is in the law generally. See, e.g., *Louis Vuitton S.A. v. Lee, 875 F.2d 584, 590 (7th Cir. 1989)* (contributory trademark infringement). One who, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings is held to have a criminal intent, *United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990)*, because a deliberate effort to avoid guilty knowledge is all that the law requires [**18] to establish a guilty state of mind. *United States v. Josefik, 753 F.2d 585, 589 (7th Cir. 1985)*; *AMPAT/Midwest, Inc. v. Illinois Tool Works Inc., 896 F.2d 1035, 1042 (7th Cir. 1990)* ("to know, and to want not to know because one suspects, may be, if not the same state of mind, the same degree of fault)." In *United States v. Diaz, 864 F.2d 544, 550 (7th Cir. 1988)*, the defendant, a drug trafficker, sought "to insulate himself from the actual drug transaction so that he could deny knowledge of it," which he did sometimes by absenting himself from the scene of the actual delivery and sometimes by pretending to be fussing under the hood of his car. He did not escape liability by this maneuver; no more can Deep by using encryption software to prevent himself from learning what surely he strongly suspects to be the case: that the users of his service--maybe *all* the users of his service--are copyright infringers.

This is not to say that the provider of an encrypted instant-messaging service or encryption software is ipso factor a contributory infringer should his buyers use the

service to infringe copyright, merely because encryption, **[**19]** like secrecy generally, facilitates unlawful transactions. ("Encryption" comes from the Greek word for concealment.) Encryption fosters privacy, and privacy is a social benefit though also a source of social costs. "AOL has begun testing an encrypted version of AIM [AOL Instant Messaging]. Encryption is considered critical for widespread adoption of IM in some industries and federal agencies." Vise, *supra*. Our point is only that a service provider that would otherwise be **[*651]** a contributory infringer does not obtain immunity by using encryption to shield itself from actual knowledge of the unlawful purposes for which the service is being used.

We also do not buy Aimster's argument that since the Supreme Court distinguished, in the long passage from the *Sony* opinion that we quoted earlier, between actual and potential noninfringing uses, all Aimster has to show in order to escape liability for contributory infringement is that its file-sharing system *could* be used in noninfringing ways, which obviously it could be. Were that the law, the seller of a product or service used *solely* to facilitate copyright infringement, though it was capable in principle of noninfringing **[**20]** uses, would be immune from liability for contributory infringement. That would be an extreme result, and one not envisaged by the *Sony* majority. Otherwise its opinion would have had no occasion to emphasize the fact (at least the majority thought it a fact--the dissent disagreed, *464 U.S. at 458-59*) that Sony had not in its advertising encouraged the use of the Betamax to infringe copyright. *Id. at 438*. Nor would the Court have thought it important to say that the Betamax was used "principally" for time shifting, *id. at 421*; see also *id. at 423*, which as we recall the Court deemed a fair use, or to remark that the plaintiffs owned only a small percentage of the total amount of copyrighted television programming

and it was unclear how many of the other owners objected to home taping. *Id. at 443*; see also *id. at 446*.

There are analogies in the law of aiding and abetting, the criminal counterpart to contributory infringement. A retailer of slinky dresses is not guilty of aiding and abetting prostitution even if he knows that some of his customers are prostitutes--he may even know which [**21] ones are. See *United States v. Giovannetti, supra, 919 F.2d at 1227; People v. Lauria, 251 Cal. App. 2d 471, 59 Cal.Rptr. 628 (App. 1967)*; Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 746-47 (3d ed. 1982). The extent to which his activities and those of similar sellers actually promote prostitution is likely to be slight relative to the social costs of imposing a risk of prosecution on him. But the owner of a massage parlor who employs women who are capable of giving massages, but in fact as he knows sell only sex and never massages to their customers, is an aider and abettor of prostitution (as well as being guilty of pimping or operating a brothel). See *United States v. Sigalow, 812 F.2d 783, 784, 785 (2d Cir. 1987); State v. Carpenter, 122 Ohio App. 3d 16, 701 N.E.2d 10, 13, 18-19 (Ohio App. 1997)*; cf. *United States v. Luciano-Mosquera, 63 F.3d 1142, 1149-50 (1st Cir. 1995)*. The slinky-dress case corresponds to *Sony*, and, like *Sony*, is not inconsistent with imposing liability on the seller of a product or service that, as in the massage-parlor case, is capable of noninfringing [**22] uses but in fact is used only to infringe. To the recording industry, a single known infringing use brands the facilitator as a contributory infringer. To the Aimsters of this world, a single noninfringing use provides complete immunity from liability. Neither is correct.

To situate Aimster's service between these unacceptable poles, we need to say just a bit more about it. In explaining how to use the Aimster software, the tutorial gives as its *only* examples of file sharing the sharing of

copyrighted music, including copyrighted music that the recording industry had notified Aimster was being infringed by Aimster's users. The tutorial is the invitation to infringement that the Supreme Court found was missing in *Sony*. In addition, membership in Club **[*652]** Aimster enables the member for a fee of $ 4.95 a month to download with a single click the music most often shared by Aimster users, which turns out to be music copyrighted by the plaintiffs. Because Aimster's software is made available free of charge and Aimster does not sell paid advertising on its Web site, Club Aimster's monthly fee is the only means by which Aimster is financed and so the club cannot be separated from the **[**23]** provision of the free software. When a member of the club clicks on "play" next to the name of a song on the club's Web site, Aimster's server searches through the computers of the Aimster users who are online until it finds one who has listed the song as available for sharing, and it then effects the transmission of the file to the computer of the club member who selected it. Club Aimster lists only the 40 songs that are currently most popular among its members; invariably these are under copyright.

The evidence that we have summarized does not exclude the *possibility* of substantial noninfringing uses of the Aimster system, but the evidence is sufficient, especially in a preliminary-injunction proceeding, which is summary in character, to shift the burden of production to Aimster to demonstrate that its service has substantial noninfringing uses. (On burden-shifting in preliminary injunction proceedings, see *FTC v. University Health, Inc., 938 F.2d 1206, 1218-19 (11th Cir. 1991)*; cf. *Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 897 (7th Cir. 2003)*; *SEC v. Lipson, 278 F.3d 656, 661 (7th Cir. 2002)*; *Liu v. T & H Machine, Inc., 191 F.3d 790, 795 (7th Cir. 1999)*.) **[**24]** As it might:

1. Not all popular music is copyrighted. Apart from music on which the copyright has expired (not much of which, however, is of interest to the teenagers and young adults interested in swapping music), startup bands and performers may waive copyright in the hope that it will encourage the playing of their music and create a following that they can convert to customers of their subsequent works.

2. A music file-swapping service might increase the value of a recording by enabling it to be used as currency in the music-sharing community, since someone who only downloads and never uploads, thus acting as a pure free rider, will not be very popular.

3. Users of Aimster's software might form select (as distinct from all-comers) "buddy" groups to exchange non-copyrighted information about popular music, or for that matter to exchange ideas and opinions about wholly unrelated matters as the buddies became friendlier. Some of the chat-room messages that accompany the listing of music files offered or requested contain information or opinions concerning the music; to that extent, though unremarked by the parties, some noninfringing use is made of Aimster's service, [**25] though it is incidental to the infringement.

4. Aimster's users might appreciate the encryption feature because as their friendship deepened they might decide that they wanted to exchange off-color, but not copyrighted, photographs, or dirty jokes, or other forms of expression that people like to keep private, rather than just copyrighted music.

5. Someone might own a popular-music CD that he was particularly fond of, but he had not downloaded it

into his computer and now he finds himself out of town but with his laptop and he wants to listen to the CD, so he uses Aimster's service to download a copy. This might be a fair use rather than a copyright infringement, by analogy to the time shifting approved as fair use in the *Sony* case. *Recording Industry Ass'n of* **[*653]** *America v. Diamond Multimedia Systems, Inc., 180 F.3d 1072, 1079 (9th Cir. 1999)*; cf. *Vault Corp. v. Quaid Software Ltd., supra, 847 F.2d at 266-67*. The analogy was sidestepped in *A&M Records, Inc. v. Napster, Inc., supra, 239 F.3d at 1019*, because Napster's system did not limit downloading to music on CDs owned by the downloader. The analogy was rejected **[**26]** in *UMG Recordings v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000)*, on the ground that the copy on the defendant's server was an unauthorized derivative work; a solider ground, in light of *Sony*'s rejection of the parallel argument with respect to time shifting, would have been that the defendant's method for requiring that its customers "prove" that they owned the CDs containing the music they wanted to download was too lax.

All five of our examples of actually or arguably noninfringing uses of Aimster's service are possibilities, but as should be evident from our earlier discussion the question is how probable they are. It is not enough, as we have said, that a product or service be physically capable, as it were, of a noninfringing use. Aimster has failed to produce any evidence that its service has ever been used for a noninfringing use, let alone evidence concerning the frequency of such uses. In the words of the district judge, "defendants here have provided no evidence whatsoever (besides the unsupported declaration of Deep) that Aimster is *actually* used for any of the stated non-infringing purposes. Absent is any indication from real-life Aimster **[**27]** users that their primary use of the system is to transfer non-

copyrighted files to their friends or identify users of similar interests and share information. Absent is any indication that even a single business without a network administrator uses Aimster to exchange business records as Deep suggests." *In re Aimster Copyright Litigation, 252 F. Supp. 2d 634, 653 (N.D. Ill. 2002)* (emphasis in original). We have to assume for purposes of deciding this appeal that no such evidence exists; its absence, in combination with the evidence presented by the recording industry, justified the district judge in concluding that the industry would be likely to prevail in a full trial on the issue of contributory infringement. Because Aimster failed to show that its service is ever used for any purpose other than to infringe the plaintiffs' copyrights, the question (as yet unsettled, see Wu, *supra*, at 708 and nn. 95 and 98) of the net effect of Napster-like services on the music industry's income is irrelevant to this case. If the *only* effect of a service challenged as contributory infringement is to enable copyrights to be infringed, the magnitude of the resulting loss, **[**28]** even whether there is a net loss, becomes irrelevant to liability.

Even when there are noninfringing uses of an Internet file-sharing service, moreover, if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses. Aimster failed to make that showing too, by failing to present evidence that the provision of an encryption capability *effective against the service provider itself* added important value to the service or saved significant cost. Aimster blinded itself in the hope that by doing so it might come within the rule of the *Sony* decision.

It complains about the district judge's refusal to hold an evidentiary hearing. But his refusal was consistent with

our decision in *Ty, Inc. v. GMA Accessories, Inc., supra, 132 F.3d at 1171* (citations omitted), where we explained that "if genuine issues of material fact are created by **[*654]** the response to a motion for a preliminary injunction, an evidentiary hearing is indeed required. But as in any case in which a party seeks an **[**29]** evidentiary hearing, he must be able to persuade the court that the issue is indeed genuine and material and so a hearing would be productive--he must show in other words that he has and intends to introduce evidence that if believed will so weaken the moving party's case as to affect the judge's decision on whether to issue an injunction." Aimster hampered its search for evidence by providing encryption. It must take responsibility for that self-inflicted wound.

Turning to the second issue presented by the appeal, we are less confident than the district judge was that the recording industry would also be likely to prevail on the issue of vicarious infringement should the case be tried, though we shall not have to resolve our doubts in order to decide the appeal. "Vicarious liability" generally refers to the liability of a principal, such as an employer, for the torts committed by his agent, an employee for example, in the course of the agent's employment. The teenagers and young adults who use Aimster's system to infringe copyright are of course not Aimster's agents. But one of the principal rationales of vicarious liability, namely the difficulty of obtaining effective relief against **[**30]** an agent, who is likely to be impecunious, Alan O. Sykes, "The Economics of Vicarious Liability," *93 Yale L.J. 1231*, 1241-42, 1272 (1984), has been extended in the copyright area to cases in which the only effective relief is obtainable from someone who bears a relation to the direct infringers that is analogous to the relation of a principal to an agent. See 2 Goldstein, *supra*, § 6.2, pp. 6:17 to 6:18. The canonical illustration is the owner of a dance hall who hires dance bands

that sometimes play copyrighted music without authorization. The bands are not the dance hall's agents, but it may be impossible as a practical matter for the copyright holders to identify and obtain a legal remedy against the infringing bands yet quite feasible for the dance hall to prevent or at least limit infringing performances. And so the dance hall that fails to make reasonable efforts to do this is liable as a vicarious infringer. *Dreamland Ball Room v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929)*, and other cases cited in *Sony Corp. of America, Inc. v. Universal City Studios, Inc., supra, 464 U.S. at 437 n. 18*; 2 Goldstein, **[**31]** *supra*, § 6.2, pp. 6:18 to 6:20. The dance hall could perhaps be described as a contributory infringer. But one thinks of a contributory infringer as someone who benefits directly from the infringement that he encourages, and that does not seem an apt description of the dance hall, though it does benefit to the extent that competition will force the dance band to charge the dance hall a smaller fee for performing if the band doesn't pay copyright royalties and so has lower costs than it would otherwise have.

How far the doctrine of vicarious liability extends is uncertain. It could conceivably have been applied in the *Sony* case itself, on the theory that while it was infeasible for the producers of copyrighted television fare to sue the viewers who used the fast-forward button on Sony's video recorder to delete the commercials and thus reduce the copyright holders' income, Sony could have reduced the likelihood of infringement, as we noted earlier, by a design change. But the Court, treating vicarious and contributory infringement interchangeably, see *id. at 435* and n. 17, held that Sony was not a vicarious infringer either. By eliminating the encryption feature **[**32]** and monitoring the use being made of its system, Aimster could like Sony have limited the amount of infringement. **[*655]** Whether failure to do so made it a vicarious infringer notwithstanding

the outcome in *Sony* is academic, however; its ostrich-like refusal to discover the extent to which its system was being used to infringe copyright is merely another piece of evidence that it was a contributory infringer.

We turn now to Aimster's defenses under the *Online Copyright Infringement Liability Limitation Act*, Title II of the Digital Millennium Copyright Act (DMCA), *17 U.S.C. § 512*; see 2 Goldstein, *supra*, § 6.3. The DMCA is an attempt to deal with special problems created by the so-called digital revolution. One of these is the vulnerability of Internet service providers such as AOL to liability for copyright infringement as a result of file swapping among their subscribers. Although the Act was not passed with Napster-type services in mind, the definition of Internet service provider is broad ("a provider of online services or network access, or the operator of facilities therefor," *17 U.S.C. § 512(k)(1)(B)*), and, as the district judge [**33] ruled, Aimster fits it. See 2 Goldstein, *supra*, § 6.3.1, p. 6:27. The Act provides a series of safe harbors for Internet service providers and related entities, but none in which Aimster can moor. The Act does not abolish contributory infringement. The common element of its safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by "repeat infringers." *17 U.S.C. § 512(i)(1)(A)*. Far from doing anything to discourage repeat infringers of the plaintiffs' copyrights, Aimster invited them to do so, showed them how they could do so with ease using its system, and by teaching its users how to encrypt their unlawful distribution of copyrighted materials disabled itself from doing anything to prevent infringement.

This completes our discussion of the merits of Aimster's appeal. But the fact that the recording industry is likely to win this case if it is ever tried is not by itself a sufficient basis for the issuance of a preliminary injunction. A

court asked to issue such an injunction must also consider which party will suffer the greater harm as a result of a ruling for or against issuance. Aimster [**34] points out that the preliminary injunction has put it out of business; the recording industry ripostes that until it was put out of business Aimster, with an estimated 2 to 3 million users, undoubtedly was facilitating a substantial infringement of music copyrights--and remember that Aimster has presented no evidence of offsetting noninfringing uses. On this record, therefore, the harm to Aimster from the grant of the injunction must be reckoned comparable to the harm that the recording industry would suffer from denial of the preliminary injunction.

The only harm that is relevant to the decision to grant a preliminary injunction is irreparable harm, since if it is reparable by an award of damages at the end of trial there is no need for preliminary relief. The recording industry's harm should the preliminary injunction be dissolved would undoubtedly be irreparable. The industry's damages from Aimster's contributory infringement cannot be reliably estimated and Aimster would in any event be unlikely ever to have the resources to pay them. Aimster's irreparable harm from the grant of the injunction is, if anything, less, because of the injunction bond of $ 500,000 that the industry [**35] was required to post and that Aimster does not contend is inadequate. (Even without the bond, the recording industry would undoubtedly be good for any damages that Aimster may have sustained from being temporarily shut down, though, bond or no bond, there is still the measurement [*656] problem.) Even if the irreparable harms are deemed the same, since the plaintiffs have a stronger case on the merits than Aimster does the judge was right to grant the injunction.

Aimster objects to the injunction's breadth. But having failed to suggest alternative language either in the district

court or in this court, it has waived the objection. We cannot find a case that makes this point expressly, but it is implicit in the general principle that arguments made but not developed do not preserve issues for appellate review. E.g., *Jones Motor Co. v. Holtkamp, Liese, 197 F.3d 1190, 1192 (7th Cir. 1999)*. We are not impressed by Aimster's argument that the district court had an independent duty, rooted in the free-speech clause of the *First Amendment*, to make sure that the impact of the injunction on communications over the Internet is no greater than is absolutely necessary to provide the [**36] recording industry with the legal protection to which it is entitled while the case wends its way to a conclusion. Copyright law and the principles of equitable relief are quite complicated enough without the superimposition of *First Amendment* case law on them; and we have been told recently by the Supreme Court not only that "copyright law contains built-in *First Amendment* accommodations" but also that, in any event, the *First Amendment* "bears less heavily when speakers assert the right to make other people's speeches." *Eldred v. Ashcroft, 537 U.S. 186, 123 S. Ct. 769, 788-89, 154 L. Ed. 2d 683 (2003)*. Or, we add, to copy, or enable the copying of, other people's music.

AFFIRMED.

B. In re: Aimster Copyright Litigation, 252 F.Supp 634 (N.D.Ill 2002)

Master File No. 01 c 8933, Multi District Litigation # 1425

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

252 F. Supp. 2d 634; 2002 U.S. Dist. LEXIS 17054; Copy. L. Rep. (CCH) P28,500

September 4, 2002, Decided
September 5, 2002, Docketed

SUBSEQUENT HISTORY: Injunction granted at *In re Aimster Copyright Litig., 2002 U.S. Dist. LEXIS 21453* (N.D. Ill., Oct. 30, 2002)

Affirmed by In re Aimster Copyright Litig., 2003 U.S. App. LEXIS 13229 (7th Cir. Ill., June 30, 2003)

PRIOR HISTORY: *In re Aimster Copyright Litig., 177 F. Supp. 2d 1380, 2001 U.S. Dist. LEXIS 19135* (J.P.M.L., 2001)

DISPOSITION: [**1] Plaintiffs' motion for preliminary injunction granted. Plaintiffs ordered to post a bond to compensate Defendants for their losses in the event injunction reversed or vacated.

JUDGES: MARVIN E. ASPEN, Chief Judge.

OPINIONBY: MARVIN E. ASPEN

OPINION:

[*638] MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, Chief Judge:

On November 17, 2001, the Judicial Panel on Multidistrict Litigation consolidated eleven cases in this court for pretrial proceedings under Multi-District Litigation number 1425 (master file 01-c-8933). Presently before us is a joint motion for preliminary injunction filed by several of those Plaintiffs (from cases 01-c-8940, 01-c-8941, and 01-c-8942) against the owner and operator of an Internet file sharing service called Aimster.[1] At issue is a service whose very *raison d'etre* appears to be the facilitation of and contribution to copyright infringement on a massive scale. Plaintiffs seek an injunction to prevent the contributory and vicarious infringement of their copyrighted works on Defendants' system and, for the following reasons, we grant their motion.

[**2] I. FACTUAL BACKGROUND

A. Defendants

Aimster is a file sharing service that allows its members to identify large numbers of similarly situated users

---

[1] The Aimster software and service, which used to be provided through its website at www.aimster.com, has now been renamed "Madster," and is located at www.madster.com. To avoid confusion, however, this opinion will continue to refer to the software and system as Aimster.

with whom they can transfer files in encrypted form and send instant messages. Aimster is the brain child of Defendant John A. Deep, who also founded Defendant BuddyUSA, Inc. ("BuddyUSA") to develop the software and Defendant AbovePeer, Inc. ("AbovePeer") to operate the system (collectively, "Defendants"). Deep Decl. P2, n.1; [2] Pla. Brief at 3. Deep is the President [*639] and Chief Executive Officer of AbovePeer. Deep Decl. P1.

B. Plaintiffs

The instant joint motion for preliminary injunction was filed by three sets of plaintiffs from three of the eleven cases currently pending under this multidistrict litigation. Most of the plaintiffs can be grouped into two broad categories. First, a number of plaintiffs representing various record companies (the "Record Company Plaintiffs") have invested substantial time, money, and resources to create, produce, manufacture, and sell recorded music. The myriad Record Company Plaintiffs (including, *inter alia*, BMG Music, Capitol Records, Inc., and New Line Cinema Corporation) own or control the copyrights in their sound recordings and are listed in and Appendix attached to Plaintiffs' Brief. Pla. Brief at 2. The Record Company Plaintffs are each a member of the Recording Industry Association of America, Inc. ("RIAA"), a trade organization

---

[2] Deep has filed a detailed declaration describing the Aimster system and various other facts pertinent to this case. Similarly, Plaintiffs have filed many (some quite lengthy) declarations with exhibits setting forth additional relevant facts. Throughout this opinion, declarations will be cited with the last name of the declarant followed by "Decl." and the paragraph or exhibit number. In some instances, declarants have filed supplemental declaration. Those supplemental declarations are cited with a "Supp."

whose members account for approximately 90% of the sound recordings produced, manufactured, or distributed in the United States. Creighton Decl. P2. The second broad group of plaintffs includes a number of songwriters and music publishers (the "Music Publisher Plaintiffs," including, *inter alia*, Jerry Lieber Music, Mike Stoller Music, and Famous Music Corporation) who compose and publish musical compositions and own the copyrights to the underlying music and lyrics of those musical works. The Music Publisher Plaintffs own or control the copyrights to some very recognizable musical compositions, including "Jai house Rock," "My Favorite Things," and "Moon River." [3]

Together, the Music Publisher Plaintiffs and the Record Company Plaintiffs own or license the copyrights to a vast repository of music, including hit music by hugely popular artists like Madonna, Garth Brooks, the Backstreet Boys, the Beatles and Bob Dylan. Pla. Brief at 2. *See, e.g.*, Cotrell Decl. PP 3-6 (attaching many examples of Certificates of Copyright Registration on behalf of EMI Music Distribution); Eisenberg Decl. PP 3-6 (attaching many examples of Certificates of Copyright Registration on behalf of Sony Music); Ostroff **[**3]** Decl. PP 3-6 (attaching many examples of Certificates of Copyright Registration on behalf of Universal Music Group). According to Plaintiffs, the vast majority of their copyrighted musical works are available on the Aimster system for unauthorized transfer among its users in the manner described below. The Music Publisher Plaintiffs bring suit based upon the alleged infringement of underlying music and lyrics of their copyrighted songs. The Record Company Plaintiffs bring suit based upon their copyrighted sound recordings.

---

[3] *See* Complaint, *Jerry Lieber et al. v. AbovePeer et al.*, No. 01 c 8942.

C. General Background

Some of the basic technology underlying the present dispute is a matter of common knowledge and has been the subject of extensive factual findings by other courts. As such, it is not necessary to go into a detailed explanation of the nature and inner workings of the Internet, the World Wide Web, and digital compression technology (such as the widely used MP3 format). A full description can be found, by way of example, in *A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Ca. 2000)("Napster I")*,[4] *RIAA v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir. 1999)* **[*640]** *("Diamond Multimedia")* **[**4]** or *Reno v. American Civil Liberties Union, 521 U.S. 844, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997).*

Before delving into a full description of the Aimster service, it is useful to describe some underlying concepts and technology. The first of such concepts is instant messaging. Instant messaging ("IM") is a way for people to communicate instantly over the computer to one or more 'buddies' that they specify. *See generally,* Mujica Decl. PP5-7. There are several different IM networks, including America Online's Instant Messenger ("AOL IM"), ICQ, and Yahoo IM. Instant Messaging works through the use of a computer program that each individual **[**5]** user downloads to his or her machine. With the program installed, the computer connects to the IM network and the

---

[4] We note in passing that the *Napster* decision, while certainly persuasive on some points, is simply not precedential authority in this circuit. The parties expend a great deal of time and effort to convince us as to Aimster's similarities or differences *vis-a-vis* Napster. However, our decision today need not rest on the legal reasoning or factual findings of the *Napster* courts.

user can specify friends that also have the IM program installed on their computers. The system then alerts the user in real time whenever those friends are online. When a friend is online, the user can send that person an instant message that will pop up on their screen. The users can then chat back and forth in real time using their keyboards. As such, instant messaging is much faster than e-mail. An instant message pops up on the screen unbidden as soon as it is sent from a friend's computer.

AOL IM also has a feature that allows buddies to transfer files to each other.[5] There are two ways a AOL IM user can transfer files: by using a file transfer or AOL IM's "get file" functionality. A simple file transfer on AOL IM requires a user to specify a file on his hard drive to send to one of his IM buddies. The buddy, after signaling his acceptance of the transfer, would then receive the file onto his hard drive. This method of file transfer can be used to send any kind of files over the AOL IM network, including documents, digital pictures, and MP3 music.

[6]** Another aspect of AOL IM's file transfer feature is the "get file" functionality. This function is the ability of a user to specify certain files or directories that are available for other users to freely take at their leisure. So, for instance, if an AOL IM user wanted to allow his friends to download any of the pictures located on his computer, he

---

[5] The file transfer functionality of AOL IM service is relevant only insofar as it relates to Defendants' argument that AOL has unclean hands and shouldn't be able to pursue a preliminary injunction. The crux of Defendants' argument is that AOL IM allows for substantially the same file transfer abilities of which the Plaintiffs now complain about Aimster. As explain in Section III.B.4, herein however, this claim is a red herring.

would simply specify to the AOL IM program that those buddies have access to those files. Anytime thereafter, the buddies could retrieve those files. That is, the user does not have to actually send those files to his buddies; the buddies could, rather, retrieve the files for themselves. According to Raul Mujica, Vice President and General Manager of the AOL service, AOL IM's "get file" functionality is limited in two respects. First, an AOL IM user can only access the files of an AOL IM user whose identity (or unique screen name) is already known to that user. Second, since AOL IM has no capability to search the files of other users, the user must know the particular file that is being sought from the other user's hard drive before that file can be fetched. Mujica Decl. P 10. There is dispute between the parties as to the real differences [**7] between AOL IM's file transfer functionality and the functionality of Aimster. An analysis of that dispute can be found in Section III.B.4 below.

[*641] **D. The Aimster Service**

I. Basic Operations

According to Deep, Aimster performs two fundamental functions. *See generally,* Deep Decl. PP 4-6. First, it allows its users to send messages or transfer files to other users by facilitating the creation of direct user-to-user (or peer-to-peer) networks. Through the use of encryption technology contained within the Aimster software, the individual users are assured of complete privacy in their online transaction. In particular, Deep claims that Defendants have no knowledge whatsoever of when its users are exchanging files, who are exchanging files, or what files are being exchanged. Deep Decl. P 4. Aimster encrypts all the information that is transferred between its users on their private networks. Even the identities of such users are encrypted. Deep Decl. P 8. While Deep admits that

Aimster can be used to transfer musical works (just as it can be used to transfer any other information or data) from one user to another, the subject matter of the transfer and the recipient are determined [**8] entirely by the users themselves. Deep Decl. P 10. In short, Defendants go to great pains to characterize the Aimster service as merely an innocent provider of "infrastructure services" to end users, *Id.*, with the implication being that Aimster is not and should not be held responsible for the malfeasance, if any, of its end users. According to Deep, virtually all "of the copyrighted musical works that Plaintiffs claim are being infringed by Defendants are songs that are transferred by individual users from one hard drive to another using Aimster solely as an internet service provider, in much the same way that such files can be and are transferred on AOL and other internet service providers." Deep Decl. P 22.

Aimster's second fundamental function, according to Deep, is to allow users to identify other "buddies" who have similar interests and who may wish to correspond and exchange files. Deep Decl. P 5. Users of the Aimster system locate buddies by searching the user profiles on the system. The user profile identifies other users by subject matter of interest or "by the name of the file or files that user has available on his or her hard drive." *Id.*

If Deep's declaration [**9] were the only means by which we could evaluate the Aimster system, we might be convinced that it is as innocent as Defendants claim. Unfortunately for Defendants, however, Plaintiffs have submitted numerous declarations to demonstrate that Deep's description of the Aimster service is less than complete.

Plaintiffs' characterization of the Aimster service is understandably more sinister than Deep's: "Aimster is a highly integrated system that connects people throughout

the world (who otherwise would likely have no contact with one another) and *encourages* and *enables* them to make their music files, among other copyrighted works, available for copying and distribution in a single database index." Creighton Decl. P 3 (emphasis supplied).[6] **[*642]** The following description of the Aimster system (from Plaintiffs' perspective) is culled from the declarations of several individuals. *See* Creighton Decl. (from the RIAA); Farmer Decl. (Plaintiffs' independent computer expert); Forrest Decl. (Plaintiffs' attorney attaching hundreds of pages of screen shots from the Aimster system in action); Schafer Decl. (Plaintiff paralegal attaching screen shots of Aimster message boards and chat rooms); **[**10]** Cheng Decl. (Plaintiffs' attorney attaching Certificates of Copyright Registration and Aimster screen shots showing each corresponding copyrighted song available for download).

[11]** In order to use Aimster, prospective users must download the Aimster software from its website.

---

[6] The concept that Aimster catalogues all available files for download in a single, centralized database is hotly contested by the parties. The reason for this debate is that a critical aspect of the *Napster* decision was that Napster operated a central directory of all the files available on its system. According to Deep, "Aimster contains no such central database." Deep Decl. P 15. Plaintiffs disagree. See Creighton Decl. P 3; Farmer Decl. P 21-22. In the absence of an evidentiary hearing (which, as described below, we were precluded from holding by the Bankruptcy Court), we find that there is insufficient evidence to resolve this conflict. However, our decision today can be and is based upon considerations independent of this evidentiary insufficiency. In other words, the reasoning in this opinion would hold regardless of whether or not Aimster maintains a central database of files available for transfer.

Downloading and using the software (known as Classic Aimster) is free.[7] Once the software is installed and executed, Aimster piggybacks onto America Online's IM network and allows its users to communicate and share files with any other Aimster user currently online. Essentially, Aimster greatly expands the file transferring capability of AOL IM described above by designating every Aimster user as the "buddy" of every other Aimster user. In this way, every Aimster user has the ability to search for and download files contained on the hard drives of any other Aimster user (provided that the user has previously designated those files to be available for searching). The Aimster website also posts Terms of Service, to which every Aimster user putatively agrees before using Aimster. The Terms of Service specifically state that Aimster will disable the access of users who repeatedly violate copyright law. *See* Forrest Decl. Ex. 19 (screen shot of Copyright Notice).

[12]** The method by which Aimster accomplishes its purpose is quite simple. Once logged onto the Aimster system, a user need only type in a file search to be presented with a list of all Aimster users currently online (up to 500) who have files meeting the search criteria on their hard drive available for download. For example, a user seeking an MP3 of Paula Cole's "I Don't Want to Wait" (a song whose copyright is owned or controlled by Plaintiffs, *see* Cheng Decl. Ex. 1) need only type in "I Don't Want To Wait" into the Aimster search field to be presented with all buddies online that currently offer that song for download.

---

[7] Evidence suggests, however, that this is no longer the case. Efforts to download the software for free now bring a user to a page requiring registration with Club Aimster (described below) and the payment of a $ 4.95 fee. *See* Farmer Supp. Decl. P 9.

See Cheng Decl. Ex. 2 (showing screenshot of the "I Don't Want To Wait" search and a listing of available files for download). Users also have the ability to do more advanced searches. The Aimster software allows searching to be restricted by file type and bit rate. The search results provided by the Aimster software show the file name and other file characteristics directly pertinent to the distribution of MP3 files (such as file size, bit rate, frequency, and song length). Notably, the software also provides the unique screenname of the buddy who currently **[**13]** possesses the file. [8]

Once the search for a suitable file is complete, a user need only click on the file name title and then click on the "Download" **[*643]** button to obtain a copy of the song. At that moment, the Aimster system facilitates the connection of its two users through a private, encrypted network and the file is transferred between them. During the copying of a file, the Aimster system provides a constant update about the status (including the progress, the rate of transfer, the time remaining) of **[**14]** each download or upload.

While any Aimster user is on the Aimster system, the files that that user previously designated as available for transfer are available for searching and downloading by

---

[8] It is important to remember throughout this discussion that Aimster does not itself store all of the music (or other) files made available through a search on its system. Rather, each file is stored on the individual hard drive of the Aimster user's computer itself. There is, however, some question as to the amount of file "caching" (or temporary storage of material to facilitate further distribution) on the Aimster system. This activity, to the extent it is relevant, is described below in Section III.B.5.d.

any other Aimster users. Thus, while an Aimster user is searching for files to transfer *into* his or her harddrive, other Aimster users are able to search for and download files *from* that user's harddrive. In this way, an Aimster user with copyrighted music files on his harddrive available for download can thereafter become an unauthorized *distributor* of that copyrighted music as soon as another Aimster user initiates a transfer of that file. All of the searching for and transfers of files on the Aimster system is accomplished without a searching user needing to know the location or identity of any other individual or specific Aimster users.

In addition, Aimster provides the ability to automatically resume transfers of files that, for whatever reason, are interrupted. For example, in a transfer between two Aimster users of the Paula Cole song described above, it is a requirement that both users remain online during the entire transfer. The transfer is interrupted if the source user **[**15]** goes offline or otherwise terminates the transfer at any time before its completion. Aimster solves this problem by automatically reconnecting the searching user to a identical song or file located elsewhere on the hard drive of a different Aimster user and automatically resuming the transfer at the point at which it was previously terminated.

After a file transfer is completed, the transferred song or file is copied to the retrieving user's hard drive. At that point, both the retrieving user and the source user have a copy of the file that is thereafter further available for searching and transfer by other Aimster users.

2. Guardian Tutorial

Also located for a time on Aimster's website was a feature or utility called "Aimster's Guardian Tutorial."[9] This tutorial, located on (but since removed from) Defendants' web site, methodically demonstrated how to transfer and copy copyrighted works over the Aimster system. It accomplished this goal by using, as illustrative on-screen examples, some of the very copyrighted works that Defendants had previously been informed were being infringed on the Aimster system. *See* Creighton Decl. P 13, Ex. 12 (including screen shots of the Guardian **[**16]** tutorial printed from the Aimster web page); Farmer Decl. P 25.[10]

---

[9] It is unclear from both parties' submissions whether "Guardian" was another version of the Aimster software, or merely a separate feature of the existing code.

[10] In a declaration filed by Deep subsequent to oral argument on this motion, he has reiterated his position that the "Guardian Tutorial" was not prepared or placed on the Aimster website by any Defendant or their agents. Rather, the "Guardian Tutorial," according to Deep, appeared on a website called "Our Aimster" created by an individual who was not an employee or agent of Defendants. Deep claims that the creators of "Our Aimster" asked, and Defendants agreed, that the "Our Aimster" site contents would be cached onto the Aimster web site. But, claims Deep, it was not until Plaintiffs submitted their papers on this motion that he was aware of the contents of that site. Upon becoming so aware, he immediately disabled access to the "Our Aimster" material through the Aimster website. But Plaintiffs, in their response to Deep's additional declaration, point out the Guardian Tutorial was accessible from and existed on the Aimster system from at least August 16, 2001 until at least January 2002. Moreover, the screen shots of the "Guardian Tutorial" unequivocally show that it was

[**17] [*644] 3. Chat Rooms and Bulletin Boards

Aimster's service includes message (or bulletin) boards on which Aimster users would regularly post messages to each other. Schafer Decl. P 3, Ex. 1 (containing screen shots of bulletin board messages). The discussions on these bulletin boards generally fell into a range of particular topics, including: (1) Aimster users seeking to download copyrighted recordings ("I'm trying to find downloads from the Purafunalia album. Specifically the song Blast" (posted by ScanKoury, July 4, 2001)); (2) Aimster users offering recordings for download ("I have a lot of hip hop shared at all times when I'm on, usually over 500 MP3s ... Feel free to get whatever you want" (posted by biggvince, July 17, 2001)); (3) Aimster as an alternative to Napster ("I'm a long time Napster user, with about 900 MP3s ... like everyone else, the RIAA has forced me to try other mp3 websites, so here I am" (posted by honey, March 17, 2001), "Use Aimster like Napster" (posted by Marcella42, May 27, 2001)); (4) comments on the illegality of sharing copyrighted music files ("What you have with Aimster is a way to share, copy, listen to, and basically in a nutshell break the law using [**18] files from other people's computers ... I suggest you accept Aimster for what it is, an unrestricted music file sharing database" (posted by zhardoum, May 18, 2001)); and (5) bashing of the music industry and the RIAA ("LET'S ALL FUCK OVER THE MUSIC INDUSTRY ... LETS CHEAT THE VERY ARTISTS WE LISTEN TO"

---

accessible from, and was a part of, Aimster's web page. We find Deep's contention that the Defendants "were unaware of the content of the tutorial" (Deep 7/25/02 Supp. Decl. P 6) simply unbelievable.

(posted by poiuytrewqm May 20, 2001), "I AM NOT GOING TO BUY CDS ANYMORE!" (posted by OKOK, October 9, 2001)). *See, generally,* Schafer Decl. Ex. 1 (attaching screen shots).

In addition, Aimster allows for real-time chatting between buddies on online chat rooms in the Aimster system. Screen shots of the conversations in these chat rooms reveal that a frequent discussion among the users is the exchange of music files. *See* Schafer Decl. Ex. 2.

4. Club Aimster

Around November 2001, Aimster launched a new service called Club Aimster. Club Aimster is a repackaged version of the basic Aimster service that great enhances the ability of its members to locate and download copyrighted music. It accomplishes this goal by providing, for a $ 4.95 monthly fee), "All the Hot New Releases All The Time." Forrest Decl Ex. 18 (screen shot of Club Aimster introductory page).

To use Club Aimster, **[**19]** members must pay their monthly fee, download the Club Aimster software, and log-on to the site with a unique member name and password. Forrest Decl. Ex. 19 (screen shots of the log-in page and download page). Users are thereafter presented with a list of "The Aimster Top-40" -- a list of the 40 "hot new releases" most frequently downloaded by Aimster users, virtually all of which are owned by Plaintiffs. Creighton Decl. P 14 and Ex. 13. *See also* Forrest Decl. Ex. 19 (screen shots of the Aimster Top 40). The Aimster Top 40 includes the song and artist name of each selection, a review of the selection (apparently written by Defendants), the Aimster ranking, and the current "Labels" ranking.[11] Finally, each Aimster

[11] Presumably, the "Labels" ranking is based upon the song's current ranking on the Billboard Hot 100. *Billboard* is

[*645] Top 40 selection includes a "Play" button that a user can click to automatically begin the copying and transfer of that particular song to the member's computer. In this way, Club Aimster seamlessly allows for the distribution of copyrighted music without even the inconvenience of having to type in an Aimster search request – Club Aimster, in short, "takes the search out of searching." Farmer Decl. P 26.

[20]** Several screen shots from the Club Aimster service are found in the Forrest Declaration at Exhibit 19. The number one selection on the Aimster Top 40 on the date listed (October 25, 2001) is the song "Hero," by Enrique Iglesias. The current "Label" ranking of the song is listed as number nine but the written review of the song states that "This song will be # 1 on the Labels' Chart in about 2-4 weeks." Forrest Decl. Ex. 19. To download "Hero," a user need only click on the Play button situated next to the listing. Other songs available through one-click downloading on Club Aimster (as of October 25, 2001) include "I am a Slave 4 U," by Britney Spears, **[**21]** "Family Affair," by Mary J. Blige, "Turn Off the Light," by Nelly Fertado, and "You Rock my World" by Michael Jackson.

The vast majority, if not all of the music available for copying on Club Aimster is owned by Plaintiffs and is listed in the Billboard Hot 100. Creighton Decl. P 14.

5. Commercial Aspects

---

a leading periodical in the music field, is widely available, and is used by music professionals worldwide. On a weekly basis, *Billboard* prepares a list of 100 recordings receiving the most radio air play and retail sales. *See* Creighton Decl. P 18.

Defendants, according to Deep, "do not sell anything on or through their service. Except for the services provided through Club Aimster, which accounts for a very small portion of the traffic on Defendants' service, there is not money exchanged for any service and there is no paid advertising on the site." Deep Decl. P 20. This description of Aimster's commercial aspect is inaccurate.

In the time since the filing of Deep's original Declaration, it appears that Club Aimster now accounts for significantly more than "a very small portion of the traffic on Defendants' service." On the contrary, any attempt to download the Aimster software now requires that a prospective user join Club Aimster and pay the $ 4.95 monthly membership fee. This limitation exists despite text on the Aimster homepage stating that one need not be an Aimster member to download and use Classic Aimster. *See* [**22] Farmer Supp. Decl. P 9, Ex. 1 (including description of thawarted attempt to download the Aimster software for free and appropriate screen shots). As such, it now appears that every user of the Aimster system is required to join Club Aimster and pay the monthly fee. Aimster is very much a commercial enterprise. Users are expected to pay $ 4.95 per month for the privilege of "hours of entertainment every day." Forrest Decl. Ex. 19.

As further evidence of Aimster's commercial nature, Plaintiffs also attach screen shots from the Aimster web page offering various merchandise for sale. This merchandise includes Aimster Jeans, Designer Fragrance, Nutritional Supplements, and bottles of "Fat Metabolizer." *See* Creighton Decl. Ex. 23 (attaching screen shots).

[*646] There is another, if minor, commercial aspect to Aimster. Defendants' website actively solicits for $ 10 "voluntary payments" to benefit Aimster's "Fight For Freedom" against "the Recording Industry, the Motion Picture Asso-

ciation and America Online in court to protect [Aimster users'] rights to privacy and free speech." In return for their $ 10 payment, contributors were to receive an Aimster "Fight for Freedom" poster. [**23] *See* Forrest Decl. Ex. 2 (screen shot of the "Fight For Freedom" web page).

6. Availability of Music on Aimster

Plaintiffs have provided abundant documentary evidence of the vast amounts of copyrighted music available on Aimster system. By way of example, Plaintiffs' representatives on the Aimster system conducted searches for and downloaded the music of every single recording on the November 3, 2001 Billboard Hot 100. Creighton P 18, Ex. 19. Plaintiffs also searched for and downloaded every single Top 10 recording from the period between November 5, 2000 and November 3, 2001. Creighton P 18, Ex. 20. Furthermore, Plaintiffs demonstrate that at least one recording from every album certified as Gold or Diamond between November 1, 2000 and October 31, 2001 was available on the Aimster system. Creighton P 18, Exs. 21-22. Virtually all of the referenced recordings are owned or controlled by Plaintiffs. *Id.*

II. PROCEDURAL BACKGROUND

Following threatened legal action by the RIAA against Defendants for the rampant copyright infringement on the Aimster system, Defendants AbovePeer and BuddyUSA each filed separate complaints for declaratory relief against the RIAA in the United States [**24] District Court for the Northern District of New York on April 30, 2001. Thereafter, between May 24, 2001 and November 2001, numerous additional actions were commenced in the Southern District of New York, the Central District of California, the Middle District of Tennessee, and the Southern District of Florida. In July 2001, Plaintiffs, according to Deep, moved to consolidate and coordinate for pretrial proceedings all

of the actions regarding Aimster before the Judicial Panel on Multidistrict Litigation ("MDL Panel"). On November 16, 2001, the MDL Panel found that consolidation of the cases would "serve the convenience of the parties and witnesses and promote the just and efficient conduct of [the Aimster litigation]." Transfer Order at 2. The MDL Panel further concluded that this court would be a convenient, central forum given that the forums for the underlying cases were scattered throughout the country.

On December 21, 2001, Plaintiffs filed the instant motion for preliminary injunction. Defendants filed their opposition to the preliminary injunction on January 22, 2002. Both parties thereafter filed numerous pleadings and supporting material. The motion for preliminary injunction [**25] and Defendants' opposition has now been fully briefed since March 2002.

A status conference was set in this court for March 19, 2002 to discuss the parties' proposals for a case management plan and schedule a date for oral argument on the preliminary injunction. On March 11, 2002, however, prior to the status conference, Defendant John Deep filed for bankruptcy protection under Chapter 13 of the United States Bankruptcy Code. Thereafter, both corporate Defendants filed for bankruptcy under Chapter 11. With all Defendants in bankruptcy proceedings, these proceedings were stayed under the automatic stay provisions of the Bankruptcy Code pending a determination of Debtors' rights in the Bankruptcy Court for the Northern District of New York.

[*647] On May 1, 2002, Plaintiffs herein filed a motion with the Bankruptcy Court for relief from the automatic stay provisions to the extent necessary to allow our court to rule on the pending and fully briefed motion for preliminary injunction. On May 23, 2002, the Bankruptcy

Court, Judge Littlefield, held a hearing on the motion and, on June 18, 2002, granted the motion by written opinion and order.

Bankruptcy Judge Littlefield's order lifting the [**26] automatic stay limits us in the manner we are permitted to proceed. His order specifies that the automatic stay is lifted "for the limited purpose of permitting [the movants, Plaintiffs herein] to request the MDL Court to issue its decision on the pending preliminary injunction motion, without any further hearings other than oral argument of or conferences regarding the merits of the motion." *In Re John A. Deep. In Re AbovePeer, Inc., In Re BuddyUSA, Inc., 279 B.R. 653* (Bankr. N.D.N.Y. June 18, 2002). As such, by the very terms of Judge Littlefield's order we were precluded from holding any evidentiary hearings on the pending motion.

Seizing on this language, Defendants, on June 21, 2002, moved that we refer the motion for preliminary injunction back to the Bankruptcy Court in the Northern District of New York. The basis for Defendants' motion to transfer was that the preliminary injunction could not be decided without an evidentiary hearing to better determine the facts of the case and that such an evidentiary hearing was specifically prohibited by the Bankruptcy Court. On July 18, 2002, however, we denied Defendants' motion to transfer [**27] finding that the "evidence presently before us is sufficient at this preliminary stage of the proceedings." In short, we felt that, given the length and comprehensive nature of the parties' submissions, an evidentiary hearing was unnecessary. In fact, we would likely have decided the present motion without an evidentiary hearing even in the absence of Judge Littlefield's limiting order.

On July 24, 2002, the parties presented oral argument on the motion for preliminary injunction. All that remains

is a decision by this court on the motion and the parties can return to the Bankruptcy Court for further proceedings.

III. ANALYSIS

A. Preliminary Injunction Standard

A preliminary injunction "is an extraordinary and drastic remedy." *Mazurek v. Armstrong, 520 U.S. 968, 972, 138 L. Ed. 2d 162, 117 S. Ct. 1865 (1997).* Its purpose is to minimize the hardship to the parties pending the ultimate resolution of their lawsuit. *Anderson v. U.S.F. Logistics, Inc., 274 F.3d 470, 474 (2001).* Generally, a party moving for a preliminary injunction must show that (1) its case has some likelihood of success on the merits; (2) that no adequate remedy at law **[**28]** exists; and (3) it will suffer irreparable harm if the injunction is not granted. *Ty. Inc. v. Jones Group, Inc., 237 F.3d 891, 895 (7th Cir. 2001).* If all three conditions have been met, we must balance the harms the non-moving party will suffer if the injunction is granted against the irreparable harm the moving party will suffer if the injunctive relief is denied. *Id.* Finally, we must consider whether granting or denying the injunction will harm the public interest. *Id.*

The Copyright Act authorizes injunctive relief in situations where it is reasonable for the purposes of restraining or preventing infringement of copyright. *17 U.S.C. § 502*(a). Irreparable injury may normally be presumed from a showing of copyright infringement. *Atari Inc. v. North Am. Philips Consumer Elec. Corp., 672 F.2d 607, 620* (7th Cir.), *cert. denied, 459 U.S. 880, 74 L. Ed. 2d 145, 103 S. Ct. 176* **[*648]** *(1982).* In addition, the public interest may favor the grant of a preliminary injunction because copyright laws embody a policy of encouraging creativity. *See, e.g.,*

ISC-Bunker Ramo Corp. v. Altech, Inc., 765 F. Supp. 1310, 1333 (N.D. Ill 1990) **[**29]** *citing Atari, 672 F.2d at 620.*

B. Likelihood of Success on the Merits

Musical compositions and sound recordings are protected by the Copyright Act. *17 U.S.C. § 102*(a)(2); *Goldstein v. California, 412 U.S. 546, 552, 37 L. Ed. 2d 163, 93 S. Ct. 2303 (1973).* Copyright owners, by definition, have the exclusive rights to copy and distribute their copyrighted works. *17 U.S.C. § 106*(1) & (3). To establish direct copyright infringement, a plaintiff must prove two elements: (1) ownership in the applicable copyright(s) and (2) unauthorized copying by the defendant of the constituent elements of the work that are original. *Feist Pub., Inc. v. Rural Tel. Serv. Co. Inc., 499 U.S. 340, 361, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991).* Contributory copyright infringement, by contrast, stems from the motion that one who contributes to another's direct infringement should be held accountable. *Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1995).* As such, the first step in assessing the existence of contributory infringement is determining the existence of the underlying and direct infringing **[**30]** activity by a third party -- in this case, Aimster's users.

1. The Existence of Direct Infringement

As a threshold matter, Plaintiffs must demonstrate that Aimster's end users are themselves engaged in direct copyright infringement. Copyright infringement, as noted above, requires a showing by the Plaintiffs that (1) they own the applicable copyrights and (2) there was unauthorized copying of the elements of the work that are original. *Feist Pub., 499 U.S. at 361.* Furthermore, there is no doubt that input of a copyrighted work onto a computer constitutes the making of a copy under the Copyright Act. *NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 235*

(7th Cir.), *cert. denied, 515 U.S. 1104, 132 L. Ed. 2d 257, 115 S. Ct. 2249 (1995).*

Plaintiffs have unequivocally established that Aimster's users are engaged in direct copyright infringement. Plaintiffs have submitted convincing evidence that they own or control the copyrights for works copied and distributed using the Aimster system. Plaintiffs' declarants have attached copyright registration certificates demonstrating their ownership or control of the copyrights for hundreds **[**31]** of works found to be available through the Aimster system. *See* Agnew Decl. P 3; Cottrell Decl. PP3-6; Eisenberg Decl. PP 3-6; Leak Decl. PP 3-5; Ostroff Decl. PP 3-6; Seklir Decl. PP 3-7.

Defendants, in their brief and at oral argument, do not dispute that unauthorized copying of copyrighted works occurs on the Aimster system by Aimster's end users. Indeed, during oral argument, Defendants' counsel, George Carpinello, admitted several times that the Aimster system is used to transfer music. *See, e.g.*, Oral Argument Tr. at 32 ("Granted, [Aimster is] also being used to transfer music. There's no question about that. Again, like any other peer-to-peer system, it's being used for that.").

Instead of disputing the existence of direct infringement by Aimster's users, Defendants assert that the provisions of the Audio Home Recording Act of 1992 (the "AHRA") act as an affirmative defense.

The AHRA forbids actions based on the noncommercial use of a device to record digital or analog music recordings. **[*649]** *17 U.S.C. § 1008.* The main purpose of the AHRA was "to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their **[**32]** private, noncommercial use." *Diamond Multimedia, 180 F.3d at 1079* (quoting S. Rep. 102-294 (1992) *reprinted in 1992 WL 133198).*

According to Defendants, the AHRA shields them from liability because the AHRA was intended to immunize from liability personal use of copyrighted material by "protecting *all* noncommercial copying by consumers of digital and analog musical recordings." Def. Brief at 8, *citing Diamond Multimedia, 180 F.3d at 1079.* While Defendants do not elucidate this argument in their brief, they apparently believe that the ongoing, massive, and unauthorized distribution and copying of Plaintiffs' copyrighted works by Aimster's end users somehow constitutes "personal use." This contention is specious and unsupported by the very case on which Defendants rely.

In *Diamond MultiMedia* the Ninth Circuit affirmed the denial of a preliminary injunction against the manufacturer of a hand held device, called the Rio, capable of receiving, storing, and re-playing MP3 music files. *180 F.3d 1072.* Users of the Rio were able to transfer MP3 files already located on their computer to the Rio so that the songs could [**33] then be played elsewhere without the need for the computer. The Rio was not capable of further distributing the music to other computers. Rather, it was solely used as a means by which a user of MP3 files could make further private and personal use of those files away from his or her computer. The RIAA brought suit to enjoin the Rio, claiming it did not meet the requirements of the AHRA. Specifically, the RIAA wanted to prevent the sale of the Rio because it did not employ a Serial Copyright Management System as required by the AHRA. In finding that the RIAA did not have a likelihood of success on the merits, the Ninth Circuit found, *inter alia,* that the Rio was not a "digital audio recording device" under subject to the AHRA.

The facts of the instant case and *Diamond Multimedia* are markedly different. The activity at issue in the present case is the copying of MP3 files from one user's hard drive

onto the hard drive of another user. The Rio in *Diamond Multimedia*, by contrast, "merely [made] copies in order to render portable, or 'space shift,' those files that already reside on a user's hard drive." *180 F.3d at 1079*. The difference is akin to a owner of **[**34]** a compact disc making a copy of the music onto a tape for that owner's sole use while away from home versus the owner making thousands of copies of the compact disk onto a tape for distribution to all of his friends. Furthermore, *Diamond Multimedia* had nothing whatsoever to do with whether the MP3 files on the owner's computers themselves infringed copyrights. Rather, the decision was limited solely to the infringement issue regarding the act of shifting files from a computer to a personal device and whether that copying was subject to the particular requirements of the AHRA. In short, Defendant's reliance on *Diamond Multimedia* is entirely misplaced.

2. Contributory Infringement by Aimster

Having shown direct infringement by Aimster users, Plaintiffs must next demonstrate a likelihood of success on their contributory infringement claim. A party can be liable for contributory infringement where the party "with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another." *Design Craft Fabric Corp. v. K-Mart Corp.,1999 U.S. Dist. LEXIS 19630, 1999 WL 1256258*, at *4 (N.D. Ill. 1999) (*quoting Gershwin Publ'g Corp. v. Columbia Artists Mgt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)*). **[*650]** **[**35]**

a. Knowledge of Infringing Activity

The imposition of contributory liability requires that the secondary infringer know or have reason to know of the direct infringement. *See A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004, 1020 (9th Cir. 2001)("Napster II"); Cable/*

Home Comm. v. Network Prods., Inc., 902 F.2d 829, 846 (11th Cir. 1990).

There is no doubt that Defendants either know or should know of the direct infringement occurring on the Aimster system. Plaintiffs have sent repeated notices to Defendants of the obvious infringing activity on Aimster. On April 3, 2000, Frank Creighton of the RIAA sent a cease-and-desist letter to Defendants in which he detailed the availability of copyrighted works on Aimster. Creighton Decl. P 7, Ex. 8. Again, on May 9, 2001, Mr. Creighton sent a cease-and-desist letter to Defendants, this time including screen shots showing approximately 2900 sound recordings owned or controlled by RIAA members available for download through Aimster. Creighton Decl. P 10, Ex. 11. On November 26, 2001, Mr. Creighton sent a third letter to Defendants again demonstrating the existence of unauthorized sound recordings available **[**36]** through Aimster and specifically mentioning Club Aimster. Creighton Decl. P 14, Ex. 13.

Aimster's Guardian Tutorial is further evidence of Defendants' knowledge of infringing activity. The Tutorial was available on the Aimster web site and methodically demonstrated how to infringe Plaintiff's copyrights by using specific copyrighted titles as pedagogical examples. Defendants' service, moreover, included online chat rooms and bulletin board systems in which Aimster users openly discussed trafficking in copyrighted material and "screwing" the RIAA. Each of these elements, taken together or even individually, would conclusively demonstrate Defendants' knowledge of the infringing activity taking place on the Aimster system. *See, e.g., Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 261 (9th Cir. 1996)* ("no question" that plaintiff adequately alleged the element of knowledge in contributory copyright infringement claim where the

sheriff had sent letters notifying the defendant that infringing materials were being sold at defendant's swap meet).

Club Aimster provides further evidence of Defendant's knowledge of infringement. With Club Aimster, Defendants actually [**37] comment upon and track the top copyrighted sound recordings available on Aimster. The "Aimster Top 40," available to users through Club Aimster, not only provides users with an easy way to locate and download copyrighted material, but it even makes reference to where each particular song is ranked on the Aimster list *vis-a-vis* the music labels' lists. See Forrest Decl. Ex 19.

In short, the letters to Defendants by the RIAA, the existence of the Guardian Tutorial, the activity on Aimster's chat rooms and bulletin boards, and the operation of Club Aimster all demonstrate that Defendants have actual knowledge of the infringing activity

Despite this overwhelming evidence, Defendants point to a technical attribute of the Aimster system that, they say, prevents them from having such knowledge. According to Deep, the Aimster system encrypts the data sent between the users' computers such that Defendants are never aware of which users are actually transferring which files. Defendants argue that, "every communication between and among users is encrypted. Just like an electronic bank or financial transaction, only the parties to the transaction have access to the [*651] transmission." Def. Brief [**38] at 10. The crux this argument is that, while Plaintiffs may be able to point to specific users on the Aimster system that have copyrighted material available on their individual hard drives, Plaintiff cannot show, nor can Defendants actually be aware of, specific transfers of such material between Aimster's users. This limitation exists because Aimster itself encrypts the communications between its users

so that no one but those users are aware of what files are being transferred. Thus, according to Deep, "Defendants have no knowledge of when an exchange takes place, who is exchanging information[,] or what information is being exchanged." Deep. Decl. P 4.

Defendants' encryption argument, clever though it may be, does not convince us that they lack actual knowledge of infringement. It may be true that, due to Aimster's encryption scheme, Defendants are unaware of the actual specific transfers of specific copyrighted music between specific users of the Aimster system. However, there is absolutely no indication in the precedential authority that such *specificity* of knowledge is required in the contributory infringement context. Plaintiffs have provided defendants with screen shots **[**39]** of the Aimster system showing the availability of Plaintiffs' copyrighted sound recordings on those users' hard drives. Forrest Decl. Ex. 20. The screen shots unequivocally identify the individual users ("buddies") who possess the offending files. *Id.* Each of these individually identified users must log on to the Aimster system with a password and user name provided by Aimster. Forrest Decl. Ex. 19 (screen shot of the Aimster login screen). While it may be true that the actual transfers between users are unknown to Defendants due to Aimster's encryption scheme, it is disingenuous of Defendants to suggest that it is unaware of which users are using its system and what files those users are offering up for other users to download at their whim. It is also disingenuous of Defendants to suggest that they lack the requisite level of knowledge when their putative ignorance is due entirely to an encryption scheme *that they themselves put in place.*

Even if we were to agree that the encryption on Defendants' system prevents them from having actual knowledge of infringement, the encryption scheme would not prevent Defendants from having constructive knowledge.

Constructive knowledge [**40] may also meet the knowledge requirement of a contributory infringement claim. *See Gershwin Publ'g Corp., 443 F.2d at 1162.* Here, given the facts described above, Defendants clearly should have been aware of the infringing activity. Such constructive knowledge suffices for our purposes.

b. Induce, Cause, or Materially Contribute To The Infringing Activity of Another

Plaintiffs have also successfully shown that Defendants materially contribute to the underlying infringement by Aimster's users. Here, the Ninth Circuit's reasoning in *Fonovisa, 76 F.3d 259,* is illustrative. In that case, the court held that the owners of a swap meet or flea market could be held contributorily liable for the infringement of individual vendors in the swap meet when those vendors were trafficking in counterfeit musical recordings. In finding that the swap meet organizers materially contributed to the infringing activity of the vendors, the court reasoned that "it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by the swap meet." *Id. at 264.* Those services included "the [**41] provision of space, utilities, parking, advertising, plumbing, and customers." *Id.* Relying on *Fonavisa,* the district court in *Napster I* (dealing with a file sharing service [*652] , Napster, markedly similar to the Aimster service) found that the provision of services by Napster were analogous to the provision of services in *Fonovisa. Napster I, 114 F. Supp. 2d at 919.* Such services provided by Napster included supplying "the proprietary software, search engine, servers, and means of establishing a connection between users' computers." *Id.* Furthermore, without the support services offered by Napster, its users "could not find and download the music they want." *Id.*

Here, too, we rely on *Fonovisa* to support our finding that Defendants have materially contributed to infringing activities. Instead of parking spaces, advertisement, and plumbing, Defendants in this case have provided the software and the support services necessary for individual Aimster users to connect with each other. Without Aimster's services, Aimster's infringing users would need to find some other way to connect. We need not solely rely on such "but for" causation, however, for Defendants [**42] go much further. The very existence of Club Aimster demonstrates the extent to which Defendants contribute to infringing activity. The Aimster Top 40 catalogues and presents for Aimster users the top copyrighted music that they may wish to transfer. It comments upon that music and, in some cases, even suggests that the user *should* have it. *See, e.g.*, Forrest Decl. Ex. 19C ("Aimster Sayz (sic): Anybody that Wns this, maybe you could be my hero ..."). What's more, users wishing to download music using Club Aimster need merely click on a play button and the Aimster software automatically creates a connection with another users' computer to facilitate the transfer. As stated by Plaintiffs in their brief, "Aimster predicates its entire service upon furnishing a 'road map' for users to find, copy, and distribute copyrighted music." Pla. Brief at 13. We agree. Defendants manage to do everything but actually steal the music off the store shelf and hand it to Aimster's users.

i. Unintended Effect

Instead of ~~directly~~ arguing against this point, Defendants urge us to consider that Plaintiffs reasoning would have the collateral, unintended effect of making liable *every* Internet [**43] service provider as long as the provider's service could be said to be the "but for" cause of the infringing activity of some of its users. "If Aimster were held to materially cause infringement." say Defendants, "so

would every search engine, instant messenger[,] and internet service provider." Def. Brief at 11. Yet this argument ignores the reality of Defendants' service as compared to the search engines and instant messengers to which they claim such similarity. A search engine does not entice its users to infringe others' copyrights. Instant Messaging programs (like AOL IM) do not index, rank, and comment upon MP3 music for its users to browse and copy. Aimster is different.[12]

ii. Substantial Non-Infringing Uses

As another defense to the contributory infringement claim, Defendants argue that Aimster is capable [**44] of "substantial non-infringing uses" as identified by the Supreme Court in *Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984).* In *Sony,* the Supreme Court rejected the efforts of the entertainment industry to enjoin the sale and distribution of Betamax video cassette recorders that were being used by their users to record copyrighted television [*653] broadcasts. Finding that the video recorders were capable of substantial non-infringing uses, the Court declined to extend contributory liability to the recorders' manufacturer. Defendants argue that, like the betamax video recorder, Aimster is capable of substantial non-infringing uses. Such uses include the ability of Aimster users to transfer any number and type of non-copyrighted files and messages to other users,[13] and the ability of users to identify other users

---

[12] Nonetheless, Defendants persist in their argument that AOL IM allows for the transfer of copyrighted music just as Aimster does. This argument is more fully discussed below in Section III.B.4.

[13] In fact, during oral argument Defendants' counsel contended that a large number of the files transferred through

with similar interests, share information, and develop clubs. Def. Brief at 9. In addition, businesses without a network administrator may use Aimster to exchange business records securely and efficiently. Deep Decl. P 16-18.

[45]** *Sony* is plainly distinguishable from the present case. First, in *Sony*, the court found that the *principal* use of video recorders was non-infringing (mere "time shifting"). *464 U.S. at 421.* By contrast, Defendants here have provided no evidence whatsoever (besides the unsupported declaration of Deep) that Aimster is *actually* used for any of the stated non-infringing purposes. Absent is any indication from real-life Aimster users that their primary use of the system is to transfer non-copyrighted files to their friends or identify users of similar interests and share information. Absent is any indication that even a single business without a network administrator uses Aimster to exchange business records as Deep suggests. Indeed, the mere inclusion of such evidence would not suffice unless it tended to show that such use constituted Aimster's primary use. Instead, the evidence leads to the inescapable conclusion that the *primary* use of Aimster is the transfer of copyrighted material among its users.

Second, *Sony* applied only to a "staple article of commerce." *464 U.S. at 442.* The Court opined that copyright law must look beyond actual **[**46]** duplication of a publication and look also to "the products or activities that make such duplication possible." *Id.* "Accordingly," said the Court, "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes." *Id.* The Court noted that

---

Aimster are adult photographs rather than copyrighted music. Oral Arg. at 21.

contributory infringement is usually reserved for cases "involving an ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred," and observed that the Betamax VCR "plainly does not fall into that category." *Id. at 437-8* ("The only contact between Sony and the users of the Betamax ... occurred at the moment of sale."). Here, Aimster cannot be said to be such a staple article of commerce. It is not discrete product, like a Betamax VCR, to be sold to customers who thereafter use the machine as they see fit. Instead, Aimster is a *service* more closely akin to the swap meet in *Fonavisa.* Like the swap meet organizers in *Fonavisa,* Defendants provide an ongoing service to their users, including the provision of software, the maintenance **[**47]** of the Aimster system, and the continuing control of editorial content (ie. Club Aimster). Unlike the case in *Sony,* the instant case involves an ongoing relationship between the direct infringers (the users) and the contributory infringers (the Defendants).

Third, there is nothing to suggest that *Sony* extends to protect the unauthorized and widespread *distribution* of infringing works. The conduct of the Betamax users at issue was the "private, home use of VTR's for recording programs broadcast **[*654]** on the public airwaves without charge to the viewer." *Sony, 464 U.S. at 425.* There was simply "no issue concerning the transfer of tapes to other persons." *Id.* By stark contrast, Aimster has virtually nothing to do with private, home use copying (or time shifting). Instead, Aimster makes each of its users a global distributor of Plaintiff's copyrighted music for copying by any number of other Aimster users. Much like the AHRA argument discussed above, Defendants cannot successfully contend that Aimster involves merely private, home use.

Fourth, there is authority to suggest that Sony's protection is not available when the products at issue are specifi-

cally manufactured [**48] for infringing activity, even if those products have substantial non-infringing uses. *See, e.g., Cable/ Home Comm., 902 F.2d at 846* (even though "other uses" existed, defendants liable where they "utilized and advertised these devices primarily as infringement aids and not for legitimate, noninfringing uses."); *A&M Records, Inc. v. Abdailah., 948 F. Supp. 1449, 1456 (C.D. Cal. 1996).* Here, it is our finding that Aimster is a service specifically designed to aid the infringing activities of its users and, on that basis alone, should not be eligible for *Sony's* protections.

Finally, the court in *Sony* approvingly cited the district court's finding that Sony had not "influenced or encouraged" the unlawful copies. *Sony, 464 U.S. at 438.* Aimster does not fall into this category of innocent enabler. Indeed, our factual findings demonstrate that Aimster actually goes to great lengths to both influence and encourage the direct infringement among its users.

We are convinced that Defendants had knowledge of and materially contributed to the infringing activity of Aimster's users. We are further convinced that the protections of *Sony* [**49] are simply not applicable to the instant case. As such, Plaintiffs have adequately demonstrated a likelihood of success on the merits for the contributory infringement claim.

3. Vicarious Infringement

Even if we were to find that Plaintiffs did not have a likelihood of success on the contributory infringement claim, we would, as an alternative, find a likelihood of success on the vicarious infringement claim. Vicarious copyright infringement is established when a defendant has "the right and ability to supervise infringing activity and also has direct financial interest in such activities." *Hard Rock Cafe Licensing Corp. v. Concession Services, Inc.,*

955 F.2d 1143, 1150 (7th Cir. 1992) (citing *Gershwin Publ'g Corp., 443 F.2d at 1162*). Unlike contributory liability, one can be liable for vicarious copyright infringement even without knowledge of the infringement. *F.E.L. Pub., Ltd. v. Nat'l Conference of Catholic Bishops, 466 F. Supp. 1034, 1040 (N.D. Ill. 1978)* (citing *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929)*).

a. Right and Ability to Supervise

Defendants have **[**50]** the right and ability to supervise Aimster's users. On this point, the Ninth Circuit's reasoning in *Fonovisa* is again instructive.[14] In *Fonovisa, 76 F.3d at 262*, the swap meet organizers had the right to terminate individual vendors at any time and controlled the access of customers to the swap meet area. These facts, among others, were integral to the court's finding that the swap meet organizers had the right and ability to control the infringing activities of the vendors. *Id. at 263.*

[*655] Here, Defendants have largely the same abilities as the defendants in *Fonovisa*. Defendants, according to their own posted Terms of Service, have the right to terminate individual users. The Terms of Service state that Aimster will "take down" "infringing material" and that repeat violators of copyright law "may have their access to all services terminated." Forrest Decl. Ex. 8. Furthermore, Defendants **[**51]** control the access of Aimster's users. Users of the system are required to log on after paying their monthly fee to join Club Aimster. This log in requires the user to supply a "Member Name" and password. Forrest Decl. Ex. 19.

---

[14] The court in *Fonovisa* addressed both contributory and vicarious infringement.

We are not convinced by Defendants' argument that, due to the encryption on the Aimster system, they do not have the ability to block user's access to the service without shutting the whole system down. Def. Brief at 11. This argument, even if it were true, would not prove that Defendants did not have the right and ability to supervise. The fact that users must log in to the system in order to use it also demonstrates that Defendants know full well who their users are. Defendants argue that Aimster's architecture prevents them from discovering the "physical internet address" of their users. Def. Brief at 11. Yet, there is nothing about the right and ability to control which requires Defendants to have such precise identifying knowledge.

b. Direct Financial Interest

Defendants' direct financial interest in the infringing activities of its users is without question. Each Club Aimster user must pay $ 4.95 per month to use the service. Credible evidence (described **[**52]** in Section I.D.5) even suggests that *every* Aimster user must now pay this fee. Defendants solicit monetary contributions on the Aimster site to help fund their involvement in this litigation. Defendants sell various Aimster-related merchandise on their site, including Aimster "Fight For Justice" posters apparently intended as a rallying call for the free availability of copyrighted music. In short, Aimster is very much a commercial enterprise and Defendants have a direct financial interest in the infringement by its users.

The financial benefit element is also satisfied where; as here, the existence of infringing activities act as a draw for potential customers. *See, e.g., Napster II, 239 F.3d at 1023* ("Financial benefit exists where the availability of infringing material 'acts as a draw' for customers." (quoting *Fonovisa, 76 F.3d at 263-264)).* The facts demonstrate that Aimster's users were drawn to the service in this manner.

Aimster's bulletin boards and chat rooms are replete with examples of users drawn there simply because they know it is a place where they can obtain infringing material.

Plaintiffs have thus shown a reasonable likelihood **[**53]** of success on the vicarious infringement claim.

4. Unclean Hands

Defendants next contend that the preliminary injunction should be denied due to AOL's unclean hands. AOL, claim Defendants, "engages in the same conduct that it and the other Plaintiffs rail against here." Def. Brief at 6. Defendants argue that AOL, through AOL IM, "has now become one of the largest purveyors of file sharing in the entire world" and "provides the *exact same service* as Defendants." *Id.* at 7 (emphasis supplied). Defendants are mistaken that unclean hands should prevent injunctive relief, however, because AOL's conduct simply is not relevant to this case.

The doctrine of unclean hands prevents plaintiffs from obtaining relief for conduct in which they themselves participated. *Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co., 324 U.S. 806, 814-15,* **[*656]** *89 L. Ed. 1381, 65 S. Ct. 993, 1945 Dec. Comm'r Pat. 582 (1945).* The maxim applies "to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Packers Trading Co. v. Commodity Futures Trading Comm'n, 972 F.2d 144, 148 (7th Cir. 1992).* **[**54]** While we have wide discretion to refuse to aid an unclean litigant, *Id.*, "the doctrine is not to be used as a loose cannon, depriving a plaintiff of an equitable remedy to which he is otherwise entitled merely because he is guilty of unrelated misconduct." *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 601 (7th Cir. 1986).*

Deep's declaration provides a detailed account (including a series of screen shots) of the means by which one can download and transfer copyrighted music through AOL's service. In addition, Deep filed a supplemental declaration on this issue after the Time Warner Music Group Plaintiffs filed a separate reply brief dealing specifically with differences between AOL IM and Aimster.

These materials convince us unequivocally that Aimster and AOL IM are quite different in the means by which they allow file transfers between users. In short, Aimster's system makes the process of locating and copying an infringing file extremely easy while the file transfer capabilities of AOL's system are clearly of secondary importance. Even more important than the mere functionality of the two systems is the fact that Aimster clearly encourages, entices, **[**55]** and contributes to the infringement of its users (witness, for example, Club Aimster and the 'Fight for Freedom' posters), while AOL's service does nothing of the sort.

Putting aside the differences or similarities of Aimster versus AOL IM, however, there is a more important issue. Defendants go to great pains to describe the conduct of AOL, but *AOL is not even a party to this case.* At best, AOL can be described as having a tenuous relationship with only one group of Plaintiffs -- the Warner Music Group Plaintiffs. As described by counsel to the Warner Music Group Plaintiffs at oral argument, "Time Warner, the AOL Time Warner parent, owns AOL" and AOL is the Internet Service Provider that owns AOL IM. Oral Arg. at 37 & Warner Reply Brief at 9. AOL, in turn, is not the owner of the Warner Music Group plaintiffs. Indeed, the only relationship between AOL and some of the Plaintiffs in this case is that some of them share a common corporate parent. *Id.*

Furthermore, even assuming *arguendo* that AOL did have unclean hands and did have some significant relationship with some of the Plaintiffs, we fail to see how that relationship would be the least bit relevant *vis-a-vis* [**56] all of the other Plaintiffs currently seeking a preliminary injunction in this case. We can find no authority to suggest that where multiple plaintiffs are seeking equitable relief, the unclean hands of one plaintiff should serve to prevent all of the other plaintiffs from receiving their due relief.

5. DMCA

Defendants next argue that they are eligible for the liability limitations found in the Digital Millennium Copyright Act ("DMCA"), *17 U.S.C. § 512*, enacted in 1998. The DMCA was "enacted both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability for 'passive,' 'automatic' actions in which a service provider's system engages through a technological process initiated by another without the knowledge of the service provider." *ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 625 (4th Cir. 2001)* (citing H.R. Conf. Rep. [*657] No. 105-796, at 72 (1998)).[15] This immunity is not presumptive, but granted only to "innocent" service providers who can show that they do not have a defined level of knowledge regarding the infringement on their system. *Id.* The [**57] DMCA's protection of an innocent service provider disappears "at the moment the service provider loses its innocence, i.e. at the moment it becomes aware that a third party is using its system to infringe." *Id.* Liability protection under the DMCA is an affirmative defense and, as

---

[15] Given the DMCA's relatively recent enactment, there is a dearth of Seventh Circuit precedent interpreting its provisions.

such, Defendants bear the burden of establishing its applicability.

The DMCA provides internet service providers with four possible safe harbors from liability for direct, vicarious, and contributory copyright infringement. The first safe harbor, § 512(a) (the "Transitory Communication Safe Harbor"), applies in certain situations where liability would otherwise be predicated on the service provider's providing connections for infringing material through its network. The second safe harbor, § 512(b) (the "System Caching Safe Harbor"), provides a limitation on liability in certain circumstances for the intermediate **[**58]** and temporary storage (or caching) of material on the service provider's system. Both parties agree that the third safe harbor, § 512(c), is not relevant in this case. The fourth safe harbor under the DMCA, § 512(d) (the "Information Location Tools Safe Harbor"), provides for a limitation on the liability of service providers who, under certain circumstances, refer or link users to infringing material or infringing activity.

The applicability (or inapplicability) of the DMCA's safe harbor provisions does not affect the availability of any other defense under the Copyright Act, such that service providers are free to establish defenses in addition to, and independent from, the DMCA provisions. *17 U.S.C. § 512*(l). Furthermore, the DMCA specifically sets forth that the applicability of its safe harbor provisions are not conditioned upon a service provider "monitoring its service or affirmatively seeking facts indicating infringing activity." *17 U.S.C. § 512*(m). In this way, the DMCA represents a legislative determination that copyright owners must themselves bear the burden of policing for infringing activity--service providers are under **[**59]** no such duty.

Before a service provider can take advantage of the safe harbor provisions, it must satisfy two threshold determinations. First, the potential defendant must meet the DMCA's definition of "service provider." Second, the potential defendant must adopt and reasonably implement a policy which terminates the access of users who are identified as repeat infringers. Each of these threshold determinations are examined in turn.

a. Service Provider

The DMCA defines "service provider" in two different ways, depending upon which safe harbor is at issue. For the purpose of the Transitory Communication Safe Harbor, "service provider" is defined as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among parties specified by a user, of material of the user's choosing, without modification of the content of the material as sent or received." *17 U.S.C. § 512*(k)(1)(A). For the purposes of the remaining safe harbors, the "service provider" definition is even more broad: a service provider is "a provider of online services or network access, or the operator of facilities therefor." *17 U.S.C. § 512*(k)(1)(B). **[**60]** The second **[*658]** definition further provides that it includes any entity that qualifies under the first definition. *Id.*

A plain reading of both definitions reveals that "service provider" is defined so broadly that we have trouble imagining the existence of an online service that *would not* fall under the definitions, particularly the second. In any event, Aimster certainly qualifies under the first version (and, by extension, the second). As described by Defendants,

> Aimster connects digital signals from one user to another so that they may identify each other as "buddies"

> or for the purpose of sending information and data from one user to another. The material to be sent and the "buddies" are chosen wholly by the user without modification by Defendants ... Aimster operates in the standard way that many infrastructure providers do, such as providers of email gateways, instant messaging and caching servers, by providing a backbone or infrastructure through a contractual relationship with other intermediate service providers, who in turn have commercial relationships with other infrastructure providers on down the line to the provider that has a relationship with **[**61]** the end user.

Def. Brief at 14. This description (uncontroverted by Plaintiffs) plainly shows that Aimster is a service provider under the DMCA's definition in that it provides the routing of digital communication between its users. Plaintiffs retort that internet service providers "generally provide a way to connect to the Internet (e.g., phone or cable modern) as well as a mechanism that tells a computer how and where to access information on the Internet," and that Aimster provides none of these services. Farmer Decl. P 28. Plaintiffs are probably correct that Aimster would not be considered an internet service provider under the commonly accepted usage of that term. However, the DMCA has provided two specific definitions of "service provider" and those broad definitions must control.

b. Repeat Infringer Policy

The second threshold determination of an entity's eligibility for the DMCA's safe harbors is the adoption and reasonable implementation of a policy to disable the access of repeat infringers. *17 U.S.C. § 512*(i)(1)(A) states in part that the DMCA's liability limitations shall apply to a service provider only if the provider "has adopted **[**62]** and reasonably implemented, and informs subscribers and ac-

count holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers." Defendants cannot jump this hurdle.

Aimster has adopted a repeat infringer policy. The copyright notice on the Aimster site informs users that they "respect copyright law and expects our users to do the same." Forrest Decl. Ex. 8 (screen shot of Aimster copyright notice). The copyright notice goes on to provide a detailed form that an aggrieved copyright owner can fill out to identify the work that is being infringed and the "user name under which such material is available through the AbovePeer service, and the path and the file name." *Id.* The notice goes on to explain the procedure for taking down or disabling access to the infringing material and the procedure for reestablishing access in the event of a mistake.[16] Finally, the notice provides that "uses who are found to repeatedly violate copyright rights of others may have their access to [*659] all services terminated." *Id.* These [*63] facts support a finding that Aimster has adopted a repeat infringer policy.[17]

The problem, Plaintiffs and Defendants agree, is in the method the repeat infringer policy is *implemented* -- that is to say, the policy is *not* implemented. Where the parties differ is as to what significance we should attach to this lack of implementation. Defendants point out, and we are inclined to believe them, that the policy is not imple-

---

[16] The copyright notice appears to track the irrelevant (for our purposes) notice, take-down, and counter notice procedures of § 512(g).

[17] It is, as we shall see, an absolute mirage, but it is a stated policy nonetheless.

mented because it *cannot* be implemented. As described in Section III.B.2.a, *supra,* the encryption on Aimster renders it impossible to ascertain which users are transferring which files. Thus, while Plaintiffs have identified many Aimster users who may have copyrighted works residing on their individual hard drives (itself probably not an infringing activity), **[**64]** Plaintiffs cannot demonstrate that any particular user is actually *transferring* any of those files (which *would* be an infringing activity). Defendants point out that the Plaintiffs have yet to identify a single repeat infringer whose access should be terminated. Indeed, say Defendants, once they "are notified that a particular internet protocol address is identified with any infringing use, Defendants will notify the primary internet service provider to terminate their access." Def. Brief at 16. This statement is not nearly so helpful and agreeable as it seems, however, because, according to Defendants themselves, such identification would be impossible.

We are not convinced by Defendants' arguments on this issue for two reasons. First, we note that the repeat infringer language of § 512(i) does not require a copyright holder to provide the sort of notice sought by Defendants. Nowhere in that subsection is there the requirement that a copyright holder provide the Defendants with the internet protocol address of a particular copyright infringer on the Aimster system. Rather, the statute merely provides that the service provider implement a policy that provides for the termination **[**65]** of access to repeat infringers in "appropriate circumstances." *17 U.S.C. § 512*(i). Second, as noted previously in this opinion, we remain nonplused with Defendants' argument that the Aimster encryption scheme absolves them of responsibility when that scheme is voluntarily instituted by the Defendants themselves. Adopting a repeat infringer policy and then purposely

eviscerating any hope that such a policy could ever be carried out is not an "implementation" as required by § 512(i).

Defendants' failure to comply with § 512(i) renders them ineligible for any of the DMCA's safe harbor protections. Nonetheless and for the sake of completeness, we will briefly address the relevant safe harbors arguments and Defendants' ineligibility for each.

c. Transitory Communications Safe Harbor

The Transitory Communications Safe Harbor holds that a service provider shall not be liable for copyright infringement by "reason of the provider's transmitting, routing, or providing connections for, materials *through* a system or network controlled or operated by or for the service provider ..." provided a number of conditions are satisfied. *17 U.S.C. § 512*(a) **[**66]** (emphasis supplied). Noting that the safe harbor specifically requires the putatively infringing material be routed or transmitted *through* the Aimster system, Plaintiffs argue that Aimster would not qualify We agree. According to Deep, the Aimster system works by allowing users to communicate and transfer files via "privately created network[s.]" See Deep Decl. P **[*660]** 4. Aimster is a "peer-to-peer service," Oral Arg. Tr. at 18, that is, it allows for the transfer of information directly between one user and another user through the Internet. If the transaction between the users is truly peer-to-peer, then the information transferred between individual users does not pass "through" Aimster's system at all. *See, e.g., A&M Records v. Napster, 114 F. Supp. 2d 896, 2000 WL 573136 (N.D. Cal. 2000)* ("even if each user's Napster browser is part of the system, the transmission goes *from* one part of the system *to* another, or *between* parts of the system, but not 'through' the system."); Farmer Decl P 28 ("Aimster has been designed so that the download itself does not pass through Aimster's own servers."). In this

way, Plaintiffs urge that the word "through" in the [**67] statute should be read to mean "as a conduit."

Defendants, in their brief, do not directly disagree with Plaintiffs' argument that material does not pass through Aimster's own servers. Instead, Defendants argue that "through" should be given a broader meaning, such as "be means of" or "by the help or agency of." Def. Brief at 14. Defendants' brief tacitly accepts that Aimster could qualify for the Transitory Communications Safe Harbor only if we were apply these broader definitions of "through." The legislative history, however, reveals that Plaintiffs' interpretation is correct: the Transitory Communications Safe Harbor is limited to situations "in which a service provider plays the role of a 'conduit' for the communications of others." H.R. Rep. No. 105-551(11) (1998), *reprinted in 1998 WL 414916,* * 130. Aimster cannot fairly be said to be a mere "conduit" of the information transferred between its users. The system provides broad search capabilities to its users, allows for the automatic resumption of interrupted downloads, provides for easy one-click downloading of the system's most popular titles, and offers editorial comment on popular titles. These features [**68] do not a mere conduit make.[18]

d. System Caching Safe Harbor

---

[18] Defendants would not be eligible for the Transitory Communications Safe Harbor for an additional reason. § 512(a)(5) requires that material be "transmitted through the system or network *without modification of its content.*" However, by Defendants' own admission, Aimster *does* modify the content: "Aimster encrypts all the information that is transferred between users." Deep Decl. P 8. This modification further belies the notion of Aimster as a mere conduit.

The System Caching Safe Harbor holds that a service provider shall not be liable for copyright infringement "by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider." *17 U.S.C. § 512*(b)(1). Defendants provide ample explanation of how and why certain information is cached on their system. See Deep Decl. P 14.[19] However, Defendants' brief reveals a fundamental misunderstanding **[**69]** of the nature of the System Caching Safe Harbor. Defendants assert that the System Caching Safe Harbor "provides a safe harbor to service providers that temporarily store material on a system and meet certain other conditions." Def. Brief at 16. Apparently, Defendants believe that the safe harbor protects service providers from liability for copyright infringement *so long as* the material in question is cached on the system. Yet, the language of the safe harbor is quite clear that the liability limitation applies to liability that may arise *"by reason of"* the caching of material. *17 U.S.C. § 512*(b)(1) (emphasis supplied).

[*661] The difference between these two interpretations is substantial. By Defendants' reading of the safe harbor, a service provider is cleansed of liability for infringing **[**70]** material whenever, during a transfer of material between its users, the material in question happens to be cached on the service provider's system. That reading is an impossibly broad interpretation of the safe harbor. Instead, the plain language of the safe harbor provides that a service provider, having met the other requirements of the safe

---

[19] Notably, however, Deep's declaration is careful to avoid claiming that Aimster ever caches the actual infringing files. He instead refers to "data," "messages," and "attributes." Deep Decl. P 14.

harbor, is safe from liability *when that liability results from the act of caching itself.*

Here, Plaintiffs do not assert that Defendants are liable as a result of the caching of material of their system. Rather, Defendants' putative liability is a result of their material contribution to the infringing activities of others. The System Caching Safe Harbor is simply not applicable in this case. [20]

[**71] e. Information Location Tools Safe Harbor

The Information Location Tools Safe Harbor provides that a service provider shall not be liable "by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link," if the service provider meets three other specified conditions. *17 U.S.C. § 512*(d).

Defendants fail to meet the conditions outlined by the Information Location Tools Safe Harbor. First, a service provider cannot have actual knowledge of the infringing material or activity, or, in the absence of actual knowledge, the service provider cannot be aware of facts or circumstances from which the infringing activity is apparent. *17*

---

[20] Defendants would not be eligible for the System Caching Safe Harbor for two additional reasons. First, just like the Transitory Communications Safe Harbor, the System Caching Safe Harbor requires that the material in question be transmitted "through" the Aimster system, § 512(b)(1)(B), when it is not. Second, the material must be transmitted without modification to its content. § 512(b)(2)(A). As noted above in footnote 19, however, Aimster's encryption scheme belies this assumption.

U.S.C. § 512(d)(1). In the alternative, if a service provider does have actual or constructive knowledge, the service provider must "act[] expeditiously to remove, or disable access to, the material." *17 U.S.C. § 512*(d)(1)(C). As described in Section III.B.2.a, however, Defendants do have actual and constructive knowledge [**72] of the infringing activity. Furthermore, there is no evidence whatsoever that Defendants have taken steps to remove or disable access to infringing material.

Second, a service provider cannot "receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity." *17 U.S.C. § 512*(d)(2). As more fully described in Section III.B.3, however, we find that Defendants do receive the sort of financial benefit described by this condition and Defendants do have the right and ability to control the infringing activity (even if they purposely avoid such ability through a self-imposed encryption scheme).[21]

---

[21] The third condition of the Information Location Tools Safe Harbor requires the expeditious take-down of infringing material after the service provider receives proper notice from the copyright holder that complies with § 512(c)(3). Because Defendants do not meet the first two conditions, however, we find it unnecessary to delve into this third condition. We note in passing, however, that the notice requirements of § 512(c)(3) probably have not been met by Plaintiffs. The RIAA sent its notice of infringement and cease and desist letters to Deep personally. However, the DMCA contains a technical requirement that such notice be sent to a service provider's designated agent. *See 17 U.S.C. § 512*(c)(2) & (3). Defendants' designated agent to receive such notification appears to be Melissa Fass of AbovePeer, not Deep. *See* Forrest Decl. Ex. 8 (screen shot of

[73] [*662] C. No Adequate Remedy at Law and Irreparable Harm**

In the context of a preliminary injunction, we must consider the equitable defense of laches as a mitigating factor with regard to Plaintiffs' claim of irreparable harm. While irreparable harm may normally be presumed in the copyright infringement context. *Atari Inc. v. North Am. Philips Consumer Elec. Corp., 672 F.2d 607, 620 (7th Cir. 1982),* that presumption can be overcome when the Plaintiff is inexcusably tardy in seeking relief and such tardiness weighs against the Plaintiffs' claim of irreparable harm. *See, e.g., Ideal Industries, Inc. v. Gardner Bender, Inc., 612 F.2d 1018, 1025 (7th Cir. 1979), cert. denied, 447 U.S. 924, 65 L. Ed. 2d 1116, 100 S. Ct. 3016 (1980).*

In assessing the excusability of delay in seeking a preliminary injunction, the relevant issue is whether a defendant has been "lulled into a false sense of security or had acted in reliance on the plaintiff's delay." *Ty, Inc., 237 F.3d at 903.* In *Ty,* the manufacturer of the popular "Beanie Babies" toys sought to preliminarily enjoin the manufacture and marketing of confusingly **[**74]** similar "Beanie Racers" toys. In addressing the defendant's argument that the plaintiffs waited too long to bring their motion, the Seventh Circuit affirmed the magistrate judge's decision that "it cannot be said that this minimal [eight month] delay lulled Defendant into a false sense of security, nor that the delay was unreasonable." *Id.* Of note was the dearth of "affirmative evidence that [Plaintiff's] delay ... caused [Defendant] to be lulled into a false sense of security or that [Defendant] in any way relied on [Plaintiff's] delay." *Id.*

Aimster Copyright Notice page providing contact information for designated agent Melissa Fass).

We are therefore instructed to search the record before us for any affirmative evidence that the Defendants in this case were lulled into a false sense of security or relied on Plaintiff's delay in continuing their operations. Like the court in *Ty*, we find such evidence to be wholly lacking.

The parties agree that Plaintiffs became aware of the Aimster system around August or September 2000. The present motion for preliminary injunction was filed with this court on December 21, 2001, about sixteen or seventeen months later. Such a lengthy delay, however, is not dispositive in and of itself because the issue is not merely **[**75]** the exact number of days between an injury and a motion. Rather, the delay must be assessed in the context of the parties' situation and in its affect on the Defendants.

Examined in the context of the parties' situation, the delay suddenly seems less objectionable. In his declaration, Deep catalogues various contacts he had with some of the record company plaintiffs in the months following Aimster's release. He asserts that he met with several product managers of AOL on September 3, 2000 to discuss the possibility of a business relationship between Aimster and AOL. Deep Decl. P 26. On October 2000, Aimster formed a business relationship with EMI/ Capital Records (one of the Plaintiffs) to market the copyrighted work "Radiohead -- Kid A." Furthermore, Deep alleges that representatives of Aimster held at least four separate meetings with representatives of Bertelsmann AG (a RIAA member) to discuss possible investments in Aimster.[22] Deep claims that in

---

[22] There is dispute as to whether these meetings took place. Plaintiffs have filed a Declaration by Deirdre McDonald, Vice President of Legal and Business Affairs for BMG Music in which Ms. McDonald refutes Deeps assertion that anyone from the Bertelmann New Media Group or Bertelsmann Random House New Media Group

these [*663] discussions he explained in detail how Aimster worked and how music could be distributed in encrypted form over the Aimster system. Deep Decl. P 28. During this entire period from approximately August 2000 to March 2001, according [**76] to Deep, neither the RIAA nor any of its members raised any issues with regard to the Aimster's alleged copyright infringement. Deep Decl. P 29. The rattling of legal sabers began on April 3, 2001, according to Deep, two weeks after a senior executive for Transworld Entertainment Corp., a retailer of musical recordings, contacted Edgar Bronfman of Vivendi/ Universal about the possibility of Transworld selling musical recordings through Aimster under a license from the major record companies. Deep Decl. P 29. On April 3, 2001, the RIAA sent its first of two cease and desist letters to Defendants threatening legal action unless Defendants took steps to eliminate the rampant copyright infringement on Aimster system. Thereafter, Defendants commenced their own declaratory judgment actions in the Northern District of New York and the procedural history of this case commenced in manner outlined above in Section II culminating, in November 2001, with all actions consolidated and transferred to this court for pretrial proceedings. Even fully accepting Defendants' recitation of events, it is obvi-

---

ever met with Aimster to discuss possible investment. McDonald Decl. P 2. Deep thereafter filed a supplemental declaration further describing his meetings with members of Bertelsmann and Random House staff and attaching various e-mails that appear to discuss the scheduling of meetings between Aimster and Bertelsmann. Notwithstanding Ms. McDonald's declaration, we have little doubt that Deep met with some if not all of the parties as he has described. We do doubt, however, that these meetings have any relevance vis-a-vis Plaintiffs' delay.

ous that the actual relevant period in our analysis of the Plaintiff's delay is from August 2000 [**77] to April 3, 2001 -- eight months rather than seventeen. Defendants could not and cannot claim that they were lulled into a false sense of security or reasonably relied upon Plaintiff's delay after April 3, 2001 because it is on that date that they definitively became aware of Plaintiff's intentions. After all, the April 3, 2001 cease and desist letter specifically notified Defendants that continued infringing activities on the Aimster system may force the RIAA to "seek additional legal remedies." Creighton Decl., Ex. 8. Such additional legal remedies undoubtedly included, in due course of time, a motion for preliminary injunction or other equitable relief. *See, e.g., Ty, Inc. v. Softbelly's, Inc., 2001 U.S. Dist. LEXIS 1341, 2001 WL 125321* *8 (N.D. Ill. 2001) (Norgle, J.) ("The very fact that Ty sent a cease and desist letter should have placed Softbelly on notice that the instant action and motion could result."). Therefore, the time period between April 3, 2001 and the eventual filing of the preliminary injunction is simply not relevant to our analysis of the appropriateness of Plaintiffs' delay in seeking the preliminary injunction.

[**78] In assessing whether Defendants were lulled into a false sense of security, we therefore need only focus on the happenings in the time period between August 2000 and April 3, 2001. For their part, Plaintiffs contend that until March 2001 the Aimster system was difficult to ascertain because it was prone to technical problems and frequently inaccessible for lengthy periods. Pla. Reply at 11. In a supplemental declaration, Frank Creighton, Executive Vice President and Director of Anti-Piracy for the RIAA, states that during the months following September 2000 when his staff became aware of the Aimster system, their attempts to monitor the system were thwarted by [*664] Aimster's technical problems. In fact, he says, "there were

days (and even weeks) during which we could not log on to the system." Creighton Supp. Decl. P 3. Screen shots of the Aimster web page during this time support Plaintiffs' contention that the service was prone to technical problems. Dated news updates on the web site specifically refer to "connection hassles and download glitches" on October 17, 2000 and promising that "a new version of Aimster is on the way." Forrest Decl. Ex. 3. The web page further notified Aimster **[**79]** users on November 17, 2000 that service would be suspended pending the release of a new version of the software. *Id.* According to the screen shots of Aimster's own web page, that new version was not released until February 2, 2001. *Id.* ("Long Awaited AIMSTER 3 Debuts!").

Defendants reject the notion that Plaintiffs were unaware of the Aimster system prior to March 2001. They point to the many contacts and meetings (described above) they had with various representatives of the Plaintiffs. But the contacts that Defendants describe are not evidence that Plaintiffs were fully aware of the Aimster system or what it would become nor are they evidence that Plaintiffs were implicitly condoning Defendants' activities. At best, it seems clear that Plaintiffs, prior to April 3, 2001, were intrigued by Aimster and trying learn more about it. See, e.g., Mujica Decl. P 23. Discussions of possible investment, even if true, are not, by themselves, sufficient to lull Defendants into a false sense of security. Deep furthermore makes much of the business relationship between Aimster and EMI/ Capital Records. This "relationship," however, consisted solely of an agreement to place an advertisement **[**80]** for Radiohead on the Aimster web page and a hyperlink to the EMI web page. Deep Decl. P 27. Despite what Defendants may argue, this "relationship" as such was hardly a definitive indication that EMI/ Capital Records knew about and condoned the wide scale unauthor-

ized transfer of Plaintiffs' copyrighted works, nor was the advertisement a reasonable indication to Defendants that they were safe from liability.[23]

Finally, Defendants have repeatedly referred to a newspaper quotation in which Barry Schuler, chairman and Chief Executive of America Online Inc., says [**81] that Aimster is "not doing anything illegal." Deep Decl. Ex. D. Defendants imply that this assertion contributed to their false sense of security and indicates Plaintiffs' full knowledge of Aimster activities as early as February 2001. Deep Decl. P 26 and Oral Argument Tr. 25. Assuming for a moment that the quotation attributed to AOL (which is not directly a party to this action) is both relevant and admissible, it is taken grossly out of context. Defendants would have us believe that AOL's chairman was explicitly condoning the illegal distribution of copyrighted music over the Internet through the Aimster system. However, it is quite clear from the context of the Washington Post article at issue that Mr. Schuler was referring specifically to Aimster's activity of piggybacking onto the AOL IM network and noting that the piggybacking practice was not itself illegal.[24] [*665] The mischaracterization of Mr. Schuler's words does not help Defendants' cause.

---

[23] Indeed, Ted Cohen, Vice-President for New Media for EMI, had filed a declaration further describing the relationship between EMI and Defendants. He recounts a meeting with Deep at which Deep sought business from the record companies by trumping up Aimster's ability to protect copyrights. The agreement reached between EMI and Defendants as a result of this meeting was a mere linking arrangement in which no money changed hands. *See* Cohen Decl. P 2-4.

[24] This obvious interpretation is supported by Mr. Shuler himself. *See* Shuler Decl. P 3 ("This statement simply meant

[**82] Plaintiffs' delay in bringing the motion for preliminary injunction was not unreasonable and is not enough the rebut the presumption of irreparable harm. Furthermore, there is insufficient affirmative evidence that Defendants were lulled into a false sense of security or that they reasonably relied on Plaintiffs' delay in assuming that a day of legal reckoning would somehow never come. In short, it is inconceivable that Defendants' had any *reasonable* belief that Plaintiffs' would not take all appropriate action to protect their intellectual property.

D. Balance of Hardships and Public Interest

The next step in the preliminary injunction analysis is to "consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied." *Ty, Inc., 237 F.3d at 895.* This step requires us to engage in a "sliding scale approach; the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff's position." *Id.*

Defendants urge that the balance of hardships tips in their favor because [**83] a preliminary injunction would preemptively destroy their business before they had the opportunity for a full hearing on the merits. Defendants' argument, however, distorts the meaning of the balance of hardships test. If we were to accept the going-out-of-business argument, a blatant copyright infringer "would be encouraged to go into an infringing business because it can later argue to a court that enjoining the blatant infringement would sink the business." *See Horn Abbot Ltd. v. Sar-*

---

that the act of piggybacking on the AOL IM service did not appear to constitute a trespass of the AOL network.").

saparilla Ltd., 601 F. Supp. 360, 369-70 (N.D. Ill. 1984) (Aspen, J.). We do not accept such reasoning. Defendants further argue that, because Aimster represents such a small portion of the total amount of the file sharing traffic on the Internet, Plaintiffs would not suffer any hardship without an injunction. This argument is specious, however, given our (here unrebutted) presumption of irreparable harm.

Using the sliding scale approach, therefore, we find that the balance of hardships tips in favor of Plaintiffs. This finding is especially apt considering our belief that Plaintiffs have an exceptionally strong likelihood of success on the merits of their contributory infringement **[**84]** claim.

The preliminary injunction analysis also requires us to "consider the public interest (non-parties) in denying or granting the injunction." *Ty, Inc., 237 F.3d at 895.* Defendants urge that the public will be harmed "by the overextension of copyright laws." Def. Brief at 20. However, given our finding regarding Plaintiffs likelihood of success of the merits, we do not agree that a preliminary injunction in this case will result in such an overextension. To the contrary, the public interest is served by upholding copyright protections against those who would seek to misappropriate protected works.

IV. CONCLUSION

For the foregoing reasons, we grant the Plaintiffs' motion for preliminary injunction. Plaintiffs are hereby ordered to submit proposed language for the preliminary injunction within 5 business days of this opinion. Defendants thereafter have two business days with which to submit any response to the proposed language. Plaintiffs' submission should be narrowly tailored, to the extent possible, to achieve the primary goal of preventing Defendants' continuing contributory infringement of Plaintiffs' copyrighted works while allowing non-infringing uses

[**85] of the Aimster system, [*666] if any, to continue. To this end, and by way of example, we invite the parties to study the Ninth Circuit's reasoning and proposed modifications to the injunction in the Napster case, *Napster II, 239 F.3d at 1027-1028* (Section VIII), and the resulting modified injunction from the district court. *A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 2001 WL 227083* (N.D. Cal. March 5, 2001). Like Napster, Aimster presents a unique problem with regard to the identification of infringing material and the transitory nature of its end-users. Plaintiffs' submission should reflect a sensitivity to these issues by including a practical method by which they can be overcome.

Pursuant to Rule 65(c), we also order Plaintiffs to post a bond for the sum of $ 500,000 to compensate Defendants for their losses in the event this injunction is reversed or vacated.

It is so ordered.

C. In re: Aimster – Preliminary Injunction Order
Master File No. 01 c 8933, Multi District Litigation # 1425

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2002 U.S. Dist. LEXIS 21453; Copy. L. Rep. (CCH) P28,522

October 30, 2002, Decided
November 1, 2002, Docketed

SUBSEQUENT HISTORY: Costs and fees proceeding at *In re Aimster Copyright Litig., 2003 U.S. Dist. LEXIS 6270* (N.D. Ill., Apr. 14, 2003)

PRIOR HISTORY: *In re Aimster Copyright Litig., 252 F. Supp. 2d 634, 2002 U.S. Dist. LEXIS 17054* (N.D. Ill., 2002)

JUDGES: [*1] MARVIN E. ASPEN, United States District Judge.

OPINIONBY: MARVIN E. ASPEN

OPINION: PRELIMINARY INJUNCTION ORDER

MARVIN E. ASPEN, District Judge:

In accordance with the Memorandum Opinion and Order of this Court filed on September 4, 2002, granting Plaintiffs' motion for preliminary injunction in Case Nos.

01-c-8940, 01-c-8941, and 01-c-8942,[25] it is hereby ORDERED, this 29th day of October, 2002, that during the pendency of this action and until final judgment is entered, Defendants John A. Deep, AbovePeer, Inc., and Buddy USA, Inc. ("Defendants"), and as their respective agents, servants, employees, representatives, subsidiaries, shareholders, officers, directors, principals, successors, assigns, licensees, transferees (including, without limitation, any purchasers, assigns, licensees, or transferees of any software or file-copying technology owned or controlled by Defendants), and all those acting in concert with them or at their direction or control (collectively "Aimster" [26]), are enjoined as follows:

1. Aimster is preliminarily enjoined from directly, indirectly, contributorily, or vicariously infringing in any manner any and all sound recordings and musical compositions **[*2]** (or portions thereof) protected by federal or state law, whether now in existence or later

---

[25] Pursuant to our Opinion, Plaintiffs submitted proposed language for the preliminary injunction order on September 11, 2002. This Court provided Defendants with an opportunity to respond to Plaintiffs' proposed language. Defendant John A. Deep submitted a response on behalf of all Defendants on October 17, 2002. While Deep took issue with Plaintiffs' proposal, he did not suggest any alternate language for this Court to adopt. *See generally* Def. Resp. Instead, Deep urged this Court to *not* issue *any* order. *See id.*

[26] The Aimster software and service, which used to be provided through its website at www.aimster.com, has now been renamed "Madster," and is located at www.madster.com. To avoid confusion, however, this Order will continue to refer to the software and system as Aimster.

created, in which Plaintiffs (and any parents, subsidiaries, or affiliates of Plaintiffs) own or control and exclusive right to reproduce, distribute, or transmit ("Plaintiffs' Copyrighted Works").

2. Aimster shall immediately disable and prevent any and all access by any person or entity ("User") to any of Plaintiffs' Copyrighted Works available on, over, through, or via any website, server, hardware, software, or any other system or service owned or controlled by Aimster (the "Aimster System and Service"), including, if necessary, preventing any and all access to the Aimster System and Service in its entirety, until such time that Aimster implements measures that prevent any and all copying, downloading, distributing, uploading, linking to, or transmitting of Plaintiffs' Copyrighted Works on, over, through, or via the Aimster System and Service.

3. Upon implementing measures to ensure that the Aimster System and Service prevents any and all copying, downloading, distributing, uploading, linking to, or transmitting of Plaintiffs' Copyrighted Works, Aimster may provide public access [*3] to the Aimster System and Service, except that Aimster shall be enjoined from the following:

(a) copying, downloading, distributing, uploading, linking to, or transmitting Plaintiffs' Copyrighted Works;

(b) enabling, facilitating, permitting, assisting, soliciting, or encouraging any User to make Plaintiffs' Copyrighted Works available for copying, downloading, distributing, uploading, linking to, or transmitting;

(c) enabling, facilitating, permitting, assisting, soliciting, or encouraging any User to copy,

download, distribute, upload, link to, or transmit, Plaintiffs' Copyrighted Works.

4. Aimster shall affirmatively monitor and patrol for, and preclude access to, Plaintiffs' Copyrighted Words on, over, through, or via the Aimster System and Service, including, without limitation, by employing such technological tools and measures that are reasonably available to carry out such obligations.

5. Within five (5) business days of entry of this Order, and thereafter on the first business day of each month, Aimster shall file with this Court, and serve on Plaintiffs via overnight mail, a Report of Compliance identifying all steps it has taken to comply with [*4] this Order.

6. Aimster shall maintain a complete list of any and all sound recordings and musical compositions made available on, over, through, or via its system, and upon five (5) business days' notice shall make such lists available to Plaintiffs for inspection and copying. Such lists shall include, without limitation, computer, website, and computer server logs delineating User search requests, download requests and upload attempts for any and all sound records and musical compositions.

7. If in implementing this preliminary injunction the parties dispute the ability of Aimster or of the Aimster System and Service to carry out the duties established under this Order, the parties may set the matter for hearing before this Court. However, such disputes will not operate to stay this injunction or afford relief from it.

8. This Order shall become effective upon the posting of a bond by Plaintiffs in the amount of Five Hundred Thousand Dollars ($ 500,000).

MARVIN E. ASPEN
United States District Judge
Dated 10/30/02

D. Copyright Revision Act of 1976.

Sec. 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "device", "machine", or "process" is one now known or later developed.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory

duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The terms "including" and "such as" are illustrative and not limitative.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed. To perform or display a work "publicly" means --

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not

including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

Sec. 106. Exclusive Rights in Copyrighted Works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Sec. 107. Limitations on Exclusive Rights: Fair Use Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Sec. 411. Registration as Prerequisite to Infringement Suit

(a) Subject to the provisions of subsection (b), no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner –

(1) serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the

work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

(2) makes registration for the work within three months after its first transmission.

Sec. 501. Infringement of Copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

Sec. 502. Remedies for Infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

Sec. 504. Remedies for Infringement: Damages and Profits

(a) IN GENERAL. – Except as otherwise provided by this title, an infringer of copyright is liable for either –

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) ACTUAL DAMAGES AND PROFITS. – The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) STATUTORY DAMAGES.

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $250 or more than $10,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $50,000. In a case where the infringer sustains the burden of proving. and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $100.The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

E. Copyright Act of 1909. § 1. Exclusive rights as to copyrighted works

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound re-

cording: *Provided,* That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided further,* That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use. #981027M001UWRIGL# View Table of Authorities Return to Text

F. The DMCA Safe Harbor Clause, 17 USCS § 512 (2003)

§ 512. Limitations on liability relating to material online

(a) Transitory digital network communications. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if--

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

(b) System caching.

(1) Limitation on liability. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which–

(A) the material is made available online by a person other than the service provider;

(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),

if the conditions set forth in paragraph (2) are met.

(2) Conditions. The conditions referred to in paragraph (1) are that--

(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology--

(i) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

(ii) is consistent with generally accepted industry standard communications protocols; and

(iii) does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if–

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

(c) Information residing on systems or networks at direction of users.

(1) In general. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider–

(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent. The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification.

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B) (i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

(d) Information location tools. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider--

(1) (A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, ex-

cept that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

....

(f) Misrepresentations. Any person who knowingly materially misrepresents under this section--

(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification,

shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

(g) Replacement of removed or disabled material and limitation on other liability.

(1) No liability for taking down generally. Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) Exception. Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider–

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

(3) Contents of counter notification. To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

(A) A physical or electronic signature of the subscriber.

(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

(4) Limitation on other liability. A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

(i) Conditions for eligibility.

(1) Accommodation of technology. The limitations on liability established by this section shall apply to a service provider only if the service provider--

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

(2) Definition. As used in this subsection, the term "standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works and--

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

(j) Injunctions. The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this section:

(1) Scope of relief.

(A) With respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

(i) An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network.

(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

(i) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

(2) Considerations. The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider–

(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

(3) Notice and ex parte orders. Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring

the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

(k) Definitions.

(1) Service provider.

(A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

(2) Monetary relief. As used in this section, the term "monetary relief" means damages, costs, attorneys' fees, and any other form of monetary payment.

(l) Other defenses not affected. The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.

(m) Protection of privacy. Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on--

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

(n) Construction. Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

G. The Washington Post, February 25, 2001, Sunday, Pg. A1

-- An elevator opens onto a dimly lit hallway. Over creaky floors, under a water-stained ceiling and around the corner stands a gray door bearing a nameplate with small black lettering: AIMSTER.

So much for grand entrances. What lies beyond is a gang of tech wonks with big ambitions for reshaping the Web.

Inside that unceremonious office, Johnny Deep, a 43-year-old tech whiz, and his minions -- college-age programmers -- have created software called Aimster that they hope will be the next Napster, the hugely popular music-swapping program whose days as a free service now appear numbered. A federal court has ordered Napster to stop users from downloading copyrighted material onto their personal computers.

Napster and Aimster are similar in some ways. Both allow Internet users to search for music files on other computers and copy songs at no cost. But Aimster does something Napster doesn't: It allows users to swap any kind of digital file, including video, text and photographs. Another big difference is that Aimster piggybacks on the in-

stant-messaging systems that count tens of millions of users, including AOL Time Warner Inc.'s giant AIM service. And Aimster has yet to be challenged by the recording industry or other owners of copyrighted material.

The music industry may have squelched Napster, but successors keep emerging. Inventors such as Deep continue to push the envelope in the face of hostile corporate interests and a battalion of attorneys, even when profitless Internet firms are hemorrhaging cash and jobs.

"Napster introduced anarchy. Aimster and its ilk are going to institutionalize it," said analyst Rob Batchelder of the research firm Gartner Group Inc. "John's got a tiger by the tail. He's got something that's about to be a monster."

Flying by the seat of his pants, Deep is a throwback to the old days of the Internet when geeky guys worked in nondescript office buildings, long before the digerati furnished their workplaces with masseuses and foosball tables.

His bare-bones approach has garnered some financial backing from corporate investors, and his software already has 2.5 million registered users. One major record label has test-marketed the product. What's more, although Aimster's software takes advantage of AOL's technology, the giant media conglomerate has so far done nothing to thwart it.

Deep shrugs at the risk of incurring AOL Time Warner's wrath. If he is concerned that his technology courts the same kind of legal challenges that bedeviled Napster, he doesn't show it. On the contrary, Deep has bet his life savings -- about $ 1 million -- on Aimster.

"I don't know of anyone who doesn't think it's crazy," he said.

That includes the oldest of his four children, 15-year-old Madeline, whose pet name for her dad is "Dorkus."

"Partly he's always nuts, but he has good ideas," she said. "I like how he goes for it."

The inspiration for Aimster came one weekend evening in late 1998. Deep noticed his daughter, then 13, sitting at her Macintosh computer with her school friends, sending instant messages to their buddies.

To Madeline, it was a social thing. For her father, it was profound technology pioneered by AOL. Like e-mail, instant messages allow Internet users to send notes to one another. But an instant message moves faster, showing up almost as soon as it's sent. An instant message is to a telephone call what e-mail is to a mailed letter. Once the users of instant messaging disconnect, their conversation evaporates. E-mail stays on a user's computer until it is deleted. Instant messages also typically announce their presence by popping up on a user's computer screen, like a ringing phone demanding to be answered.

"I remember thinking what a powerful thing AOL had hit on," Deep said.

The thing is, AOL blocks users of rival instant-messaging services from talking to members of its own messaging system, AIM. AOL says it is concerned about exposing its users to hackers, viruses and junk e-mail. Competitors figure AOL simply wants to maintain its stranglehold on a fast-growing market. It has more than 80 million registered users.

Deep initially thought he might create software that would allow other instant-messaging systems to talk to AIM users. But then Napster emerged, and its wild success got him thinking. Napster, distilled to its essence, was a file-sharing system. So was AIM, except that users shared text, not music. What if Deep combined the two? Napster plus AIM equaled Aimster.

When Aimster hit the Web on Aug. 8, the response was promising: In the first three days, about 20,000 users signed up. Deep has since expanded the product's reach. Users can now search the Napster network. Soon, Aimster

users will be able to search files of friends and family members on other instant-messaging systems -- not just their buddies on AOL's service.

So far there has been no legal assault, although some experts say that Aimster may indeed face some Napster-like issues if users begin swapping music and other copyrighted material. Such legal issues raise questions about whether Aimster can create a viable business model and make money.

"What the end-users are doing is infringement," said Steven J. Metalitz, a Washington attorney and former staff director of the Senate subcommittee on patents, copyrights and trademarks. Although it's difficult to determine Aimster's legal liability without fully understanding its technology, Metalitz said, "it does boil down to whether they should reasonably know whether it's being used for" swapping protected material, such as music.

Deep isn't worried. "We just sell software," he said. He has faith that a battery of attorneys would volunteer to defend Aimster if it becomes necessary -- and he doesn't think it will. Deep's analysis: Unlike Aimster, Napster used central computer servers, which could or did know what music files were being swapped. Aimster is more like a VCR; users might pirate movies, but the VCR manufacturer has no knowledge of it.

"We have no idea what the users are doing" among themselves, Deep said.

The Recording Industry Association of America declined to comment on Aimster. AOL Time Warner has examined the upstart's technology, and while not addressing the issue of whether it violates copyright law, says the software does not interfere with the way its own product works. Aimster manages to intercept and translate the computer language of the instant messages for its own use without altering the original.

"They're not really involved in the instant-messaging network at all, so it's not an issue that they're intruding into our network and hacking in like some other people have over time," said Barry Schuler, chairman and chief executive of America Online Inc., the Dulles-based online unit of New York's AOL Time Warner. "It is just that a creative application is piggybacking on the very popular AIM application. They're not doing anything illegal, and so we'll see where it goes."

Industry analysts expect AOL to eventually add Aimster-like features to its own instant-messaging system. Schuler did not rule out the possibility of AOL one day buying Aimster.

Whatever the future may hold, Aimster the company is not much to behold now. Its downtown Albany office is scattered with floppy disks, empty Coke bottles and tangled computer wires. Its 16 staffers voted down the idea of partitions.

Deep doesn't have an office. He keeps his calendar in his head. And he looks the part of a computer guru. Legally blind in his left eye, Deep wears thick, pewter-rimmed glasses. And everything is black -- shoes, slacks, button-down shirt and a promotional jacket for the movie "Horse Whisperer" with an aptly embroidered word on his chest: "Believe."

His employees are iconoclasts as well. They wear what they want, and when do they work? "Whenever I'm awake," said Eric Griffith, 20, a skinny programmer who is taking a semester off from nearby Rensselaer Polytechnic Institute. Griffith, a computer science major, said his parents don't get it, but he's convinced that Aimster "definitely has the potential to be the next Napster."

For now, the upstart is relying on word of mouth. Besides that, its only marketing tool is the "Aimster Girl."

When users download the software, the welcome box that appears on their computer screen shows a blond teenager whose identity has been a company secret up to now. But after much cajoling, Deep revealed that the girl is his daughter Madeline.

As it turns out, she's quite a draw. Decked out in a white T-shirt and dark slacks, she has a fan club on the Aimster Web site. Deep is thinking about an Aimster Girl poster.

It's all part of Deep's need to find a revenue model, a way of turning Aimster from cool technology into a product that makes money. Deep has other ideas. His crew is developing technology for measuring the amount of file-swapping that occurs, a service for which Aimster could charge online retailers. Last year, Capitol Records used Aimster to promote a new album by the rock band Radiohead. That was a free test, but Deep thinks such arrangements could be another revenue source.

Financial backers of Aimster share his belief. They recently invested nearly $ 1 million in the company, a big chunk of which came from investment bank First Albany Corp. Its chairman, George McNamee, is convinced that Deep is on to something big in communications: "It's an incredibly powerful idea."

For Deep, Aimster is not merely about making money but is a means to achieve loftier goals. He vows to never leave his small blue-collar hometown of Cohoes, near Albany, but he wants to change the world. He's gifted at writing software, but he wants to write a best-selling book, and now he hopes Aimster could be the vehicle. Perhaps more than anything else, he is simply a big dreamer.

The dream rewinds to Deep's childhood. He grew up in Cohoes, up the hill on Younglove Avenue, a half-mile from Harmony Mills, a hulking textile factory along the Mohawk River.

It was a high-tech center in its day -- the 1880s -- and the home of advanced spinning and weaving processes. But even as a shell of its former self, when Deep was a child, it was an awesome sight, rising out of the ground with soaring cupolas and a regiment of rectangular windows.

"It was like living next to the Empire State Building," he said.

The mill is empty now, except for a smattering of small tenants. On a snow-dappled evening, Deep stands in the shadows of the factory floor, envisioning his new offices for Aimster. Where looms and weavers once stood, he pictures computers and programmers.

Aimster, he imagines, could save the mill. It could rejuvenate his hometown. Maybe it could reshape the World Wide Web, allowing people to exchange any kind of information freely.

"It reinvents the Internet," Deep said. "It has that potential."

H. Docket of AbovePeer Inc. v. Recording Industry, *et al*, N.D.NY, the Honorable Lawrence E. Kahn

Date	#	Docket Entry
4/30/2001	1	COMPLAINT filed; FILING FEE $ 150.00 RECEIPT # 52553 ; Service deadline 6/29/01 for Recording Industry (tab)
4/30/2001	--	SUMMONS(ES) issued for Recording Industry (tab)
4/30/2001	--	Filing Order Issued; Conference set before Magistrate Judge Ralph W. Smith Jr. in Albany, Status Conference at 11:00 8/16/01 , Deadline for filing Case Management Plan, 8/6/01 (tab)

5/8/2001	3	AMENDED COMPLAINT by George Carpinello, Esq., for Abovepeer, Inc. against A&M Records, Inc., Arista Records, Inc., Atlantic Recording, BMG Music, Capitol Records, Inc, Elektra Entertain, Geffen Records, Inc., Interscope Records, Island Records, Inc., LA Face Records, MCA Records, Inc., Motown Record Comp, Polygram Records, Sire Records Group, Sony Music Entertain, Universal Records, Virgin Records, Service deadline 7/7/01 for Virgin Records, for Universal Records, for Sony Music Entertain, for Sire Records Group, for Polygram Records, for Motown Record Comp, for MCA Records, Inc., for LA Face Records, for Island Records, Inc., for Interscope Records, for Geffen Records, Inc., for Elektra Entertain, for Capitol Records, Inc, for BMG Music, for Atlantic Recording, for Arista Records, Inc., for A&M Records, Inc., for Recording Industry , amends [1-1] complaint (jel) [Entry date 05/09/01]
5/21/2001	6	ORDER TO SHOW CAUSE: by Abovepeer, Inc. for an order declaring that defendants have failed to provide proper notice to plaintiff pursuant to the Digital Millennium Copyright Act Motion Hearing set for 9:30 a.m. on 6/21/01; Response Deadline 6/11/01; Reply Deadline: 6/18/01 (Signed by Judge Lawrence E. Kahn on 5/21/01) (jel) [Entry date 05/23/01]
5/21/2001	7	AFFIDAVIT/DECLARATION along with Exhibits A-E by George F. Carpinello, Esq., for Abovepeer, Inc. Re: in support of the [6-1] motion for an order declaring that defendants have failed to provide proper notice to plaintiff pursuant to the Digital Millennium Copyright Act (jel) [Entry date 05/23/01]
5/21/2001	8	AFFIDAVIT/DECLARATION along with Exhibits A-B by John Deep for Abovepeer, Inc. Re: in support of the [6-1] motion for an order declaring that defendants have failed to provide proper notice to plaintiff pursuant to the Digital Millennium Copyright Act (jel) [Entry date 05/23/01]

5/21/2001	9	AFFIDAVIT/DECLARATION by Sanford Rosenblum for Abovepeer, Inc. Re: in support of the [6-1] motion for an order declaring that defendants have failed to provide proper notice to plaintiff pursuant to the Digital Millennium Copyright Act (jel) [Entry date 05/23/01]
5/21/2001	10	MEMORANDUM OF LAW by George F. Carpinello, Esq., for Abovepeer, Inc. in support of the [6-1] motion for an order declaring that defendants have failed to provide proper notice to plaintiff pursuant to the Digital Millennium Copyright Act (jel) [Entry date 05/23/01]
5/25/2001	12	ORDER, that defts. and all those acting in concert w/them and their counsel are hereby restrained and enjoined from taking any steps to prosecute an action entitled Zomba Recording Corp. et al. v. John Deep et al. (1-cv-4452) pending in the Southern District of NY pending further hearing of this Court, defts. are restrained and enjoined from prosecuting or participating in any other actin against pltf. herein, John Deep, or BudyUSA, Inc. in the Southern District of NY or elsewhere relating to any claims for copyright infringement or related state claims involving the operation of the Internet service known as Aimster, service of this order shall be made on local counsel for defts., Bond, Schoeneck & King, LLP. by hand delivery or telefax on 5/25/01 (signed by Judge Lawrence E. Kahn, 5/25/01) (ldi) [Entry date 05/29/01]
5/30/2001	14	MEMORANDUM by Abovepeer, Inc. in support of [12-1] order that defts. and all those acting in concert w/them and their counsel are hereby restrained and enjoined from taking any steps to prosecute an action entitled Zomba Recording Corp. et al. v. John Deep et al. (1-cv-4452) pending in the Southern District of NY pending further hearing of this Court (tab)

5/30/2001	15	Order to Show Cause Hearing Minute entry: Court Reporter: Bonnie Buckley Appearances: David Boies, George Carpinello, Esq. for plaintiff, Attorneys for defendants: Leon P. Gold, Hermes Hernandez, David Kendall, James Linnan, Russell Frackman, Evan Chessler and Katherine Forrest. Order to Show Cause hearing held: Decisions are reserved by the Court, Motion filing deadlines are set: Motion to Dismiss hearing set for 6/21/01 (not filed yet) Plaintiff's respond deadline is 6/6/01, reply be defendants due 6/11/01. All other motions (filed or not filed) are held in abeyance until dispositive motion is decided. (tab) [Entry date 05/31/01] [Edit date 05/31/01]
5/30/2001	17	ORDER TO SHOW CAUSE: by Recording Industry to Dismiss Complaint, and/or to Transfer Case to Southern District of New York, and/or to Stay pending resolution of actions in the Southern District Motion Hearing set for 9:30 a.m. on 6/21/01; Response Deadline 6/6/01; Reply Deadline 6/11/01; (Signed by Judge Lawrence E. Kahn on 5/30/01) (jel) [Entry date 06/04/01]
5/30/2001	18	AFFIDAVIT/DECLARATION by Alasdair McMullen for Recording Industry Re: in support of the [17-1] motion to Dismiss Complaint, in support of the [17-2] motion to Transfer Case to Southern District of New York, in support of the [17-3] motion to Stay pending resolution of actions in the Southern District (jel) [Entry date 06/04/01]
5/30/2001	19	AFFIDAVIT/DECLARATION by Mark Ansorge for Recording Industry Re: in support of the [17-1] motion to Dismiss Complaint, in support of the [17-2] motion to Transfer Case to Southern District of New York, in support of the [17-3] motion to Stay pending resolution of actions in the Southern District (jel) [Entry date 06/04/01]
5/30/2001	20	AFFIDAVIT/DECLARATION by Barry K. Robinson for Recording Industry Re: in support of the [17-1] motion to Dismiss Complaint, in support of the [17-2] motion to Transfer Case to Southern District of New York, in support of the [17-3] motion

to Stay pending resolution of actions in the Southern District (jel) [Entry date 06/04/01]

5/30/2001 21 AFFIDAVIT/DECLARATION by Gail Edwin for Recording Industry Re: in support of the [17-1] motion to Dismiss Complaint, in support of the [17-2] motion to Transfer Case to Southern District of New York, in support of the [17-3] motion to Stay pending resolution of actions in the Southern District (jel) [Entry date 06/04/01]

5/30/2001 22 AFFIDAVIT/DECLARATION by Deirdre McDonald for Recording Industry Re: in support of the [17-1] motion to Dismiss Complaint, in support of the [17-2] motion to Transfer Case to Southern District of New York, in support of the [17-3] motion to Stay pending resolution of actions in the Southern District (jel) [Entry date 06/04/01]

5/30/2001 23 AFFIDAVIT by Andrea M. Sharrin for Recording Industry Re: in support of the [17-1] motion to Dismiss Complaint, in support of the [17-2] motion to Transfer Case to Southern District of New York, in support of the [17-3] motion to Stay pending resolution of actions in the Southern District (jel) [Entry date 06/04/01]

5/30/2001 24 AFFIDAVIT/DECLARATION by Harvey Geller for Recording Industry Re: in support of the [17-1] motion to Dismiss Complaint, in support of the [17-2] motion to Transfer Case to Southern District of New York, in support of the [17-3] motion to Stay pending resolution of actions in the Southern District (jel) [Entry date 06/04/01]

5/30/2001 25 AFFIDAVIT/DECLARATION along with Exhibits 1-7 by Fran Creighton for Recording Industry Re: in support of the [17-1] motion to Dismiss Complaint, in support of the [17-2] motion to Transfer Case to Southern District of New York, in support of the [17-3] motion to Stay pending resolution of actions in the Southern District (jel) [Entry date 06/04/01]

5/30/2001 26 Request to Take Judicial Notice by Hermes Fernandez, Esq., for Recording Industry Association of

America, Inc. (jel) [Entry date 06/04/01]

5/30/2001 27 MEMORANDUM OF LAW by Carl Rosenbloom, Esq., for Recording Industry in support of the [17-1] motion to Dismiss Complaint, in support of the [17-2] motion to Transfer Case to Southern District of New York, in support of the [17-3] motion to Stay pending resolution of actions in the Southern District (jel) [Entry date 06/04/01]

5/30/2001 -- Motion(s) joined by Atlantic Recording, Elektra Entertain, Sire Records Group :joinder in [17-1] motion to Dismiss Complaint, joinder in [17-2] motion to Transfer Case to Southern District of New York, joinder in [17-3] motion to Stay pending resolution of actions in the Southern District (jel) [Entry date 06/27/01]

5/30/2001 38 MEMORANDUM OF LAW by Evan R. Chesler, Esq., for Atlantic Recording, Elektra Entertain, Warner Bros. Sire Records Group in support of [17-1] motion to Dismiss Complaint, [17-2] motion to Transfer Case to Southern District of New York, [17-3] motion to Stay pending resolution of actions in the Southern District (jel) [Entry date 06/27/01]

6/1/2001 16 TRANSCRIPT filed for dates of 5/30/01 (Order to Show Cause) (wjg)

6/6/2001 29 MEMORANDUM OF LAW by Katherine Forrest, Esq., for Atlantic Recording, Elektra Entertain, Sire Records Group in opposition to [6-1] motion for an order declaring that defendants have failed to provide proper notice to plaintiff pursuant to the Digital Millennium Copyright Act (jel)

6/6/2001 30 AFFIDAVIT/DECLARATION by John Cavalier for Abovepeer, Inc. Re: in opposition to the [17-1] motion to Dismiss Complaint (jel) [Entry date 06/07/01]

6/6/2001 31 AFFIDAVIT/DECLARATION by Alexandre Montagu for Abovepeer, Inc. Re: in opposition to the [17-1] motion to Dismiss Complaint (jel) [Entry date 06/07/01]

6/6/2001 32 AFFIDAVIT/DECLARATION along with Exhibit A-B by John Deep for Abovepeer, Inc. Re: in oppo-

sition to the [17-1] motion to Dismiss Complaint (jel) [Entry date 06/07/01]

6/6/2001 33 MEMORANDUM OF LAW by George Carpinello, Esq., for Abovepeer, Inc. in opposition to the [17-1] motion to Dismiss Complaint (jel) [Entry date 06/07/01]

6/11/2001 34 REQUEST TO TAKE JUDICIAL NOTICE by defts. (wjg) [Entry date 06/13/01]

6/11/2001 35 REPLY MEMORANDUM by Atlantic Recording, Elektra Entertain, Sire Records, WB to response to [17-1] motion to Dismiss Complaint, [17-2] motion to Transfer Case to Southern District of New York, [17-3] motion to Stay pending resolution of actions in the Southern District (wjg) [Entry date 06/13/01]

6/11/2001 36 SUPPLEMENTAL DECLARATION/AFFIDAVIT by Andrea Sharrin. (wjg) [Entry date 06/13/01]

6/22/2001 37 ORDER denying [17-1] motion to Dismiss Complaint, denying [17-2] motion to Transfer Case to Southern District of New York, denying [17-3] motion to Stay pending resolution of actions in the Southern District, that defendants are enjoined from prosecuting or participating in the actions before the USDC for the Southern District of NY, that the return date for plaintiff's motion to amend the complaint and consolidate actions is August 3, 2001, that Defendants' response to that motion is due by 7/20/01, that plaintiff's reply, if any, is due by 7/27/01 (signed by Judge Lawrence E. Kahn on 6/22/01) Date Entered: 6/22/01 (jel)

6/29/2001 39 NOTICE OF APPEAL by Recording Industry, A&M Records, Inc., Arista Records, Inc., BMG Music, Capitol Records, Inc, Geffen Records, Inc., Interscope Records, Island Records, Inc., LA Face Records, MCA Records, Inc., Motown Record Comp, Polygram Records, Sony Music Entertain, Universal Records, Virgin Records . FILING FEE $ 105.00 RECEIPT # 52857; Appeal record due on 7/29/01; appeals to the USCA, 2nd Cir. from Order and Decision dd 6/22/01. (kcw) [Entry date 07/02/01]

6/29/2001	40	NOTICE OF MOTION by George F. Carpinello, Esq., for Abovepeer, Inc. to Amend [1-1] complaint, to Consolidate Cases into one action, Hearing set for 9:30 a.m. on 8/3/01, Response Deadline 7/20/01, Reply to Response Deadline 7/27/01 Motion returnable before Judge/Mag. Judge: Lawrence E. Kahn (jel) [Entry date 07/10/01]
6/29/2001	41	AFFIDAVIT/DECLARATION along with Exhibit A by George F. Carpinello, Esq., for Abovepeer, Inc. Re: in support of the [40-1] motion to Amend [1-1] complaint, in support of the [40-2] motion to Consolidate Cases into one action (jel) [Entry date 07/10/01]
6/29/2001	42	MEMORANDUM OF LAW by George F. Carpinello, Esq., for Abovepeer, Inc. in support of the [40-1] motion to Amend [1-1] complaint, in support of the [40-2] motion to Consolidate Cases into one action (jel) [Entry date 07/10/01]
7/2/2001	--	Notice of appeal and certified copy of docket to USCA re: [39-1] appeal by Virgin Records, Universal Records, Sony Music Entertain, Polygram Records, Motown Record Comp, MCA Records, Inc., LA Face Records, Island Records, Inc., Interscope Records, Geffen Records, Inc., Capitol Records, Inc, BMG Music, Arista Records, Inc., A&M Records, Inc., Recording Industry (parties noticed). (kcw)
7/18/2001	47	ORDER, that all proceedings in this matter are hereby STAYED pending the determination by the Judicial Pane on MDL of the motion before it to transfer this action for consolidation in a single forum (signed by Judge Lawrence E. Kahn on 7/18/01) Date Entered: 7/18/01 (jel)
7/27/2001	--	Certified and transmitted index to the record on appeal to U.S. Court of Appeals: [39-1] appeal by Virgin Records, Universal Records, Sony Music Entertain, Polygram Records, Motown Record Comp, MCA Records, Inc., LA Face Records, Island Records, Inc., Interscope Records, Geffen Records, Inc., Capitol Records, Inc, BMG Music, Arista Records, Inc., A&M Records, Inc., Recording Industry (jel)

8/8/2001	48	Received Civil Index to the Record on Appeal acknowledged by the Court of Appeals on 8/1/01 with case number 01/7761 (Consolidated Case) (Lead Case is 01-7760 which is case number 01-cv-631). (jel) [Entry date 08/10/01]
8/8/2001	–	USCA Case Number Re: [39-1] appeal by Virgin Records, Universal Records, Sony Music Entertain, Polygram Records, Motown Record Comp, MCA Records, Inc., LA Face Records, Island Records, Inc., Interscope Records, Geffen Records, Inc., Capitol Records, Inc, BMG Music, Arista Records, Inc., A&M Records, Inc., Recording Industry USCA NUMBER: 01/7761 (jel) [Entry date 08/10/01]
8/13/2001	50	ORDER granting [49-1] motion for Andrea M. Sharrin, Matthew J. Oppenheim, Russell J. Frackman to Appear Pro Hac Vice (signed on 5/30/01 by Judge Lawrence E. Kahn) (wbl)
8/17/2001	51	NOTICE of Hearing Session before the Judicial Panel on MDL on 10/4/01. (jel) [Entry date 08/20/01]
11/28/2001	53	CONDITIONAL TRANSFER ORDER, Transferring Case to the Northern District of Illinois, Eastern Division, 01cv8936 MDL 1425 Date Entered: 11/28/01 (jel)
11/29/2001	–	Interdistrict transfer to the Northern District of Illinois – Eastern Division (jel)

I. Transcript of Proceedings – Oral Argument before the Honorable Marvin E. Aspen, July 24, 2002, 9:45 o'clock a.m., Chicago, Illinois, Page 2:10-25

The Court: Okay. I have allotted each of you an hour. That doesn't mean that I want to hear you talk for an hour.

You can assume that we have looked at the briefs and submissions carefully, and you can use that as a gauge for using your time. I will allow the plaintiff to reserve some time, if you wish.

And I don't suppose that there's any way we can convert this hearing into a hearing on a permanent injunction in light of the Lexicon cases. Does anybody have any ideas?

Mr. Carpinello: Your Honor, George Carpinello from Boies, Schiller & Flexner.

I think under the constraints that were imposed by the bankruptcy judge, I'm not sure that we can even – I mean, we would have liked to have had a hearing, but he's effectively enjoined everyone from doing that.

The Court: All right. Well, let's proceed then.

J. List of Books Published

The Complete Geek: (An Operating Manual)
by John Deep, Bruce Tinsley (Illustrator), Rich Gabriel (Illustrator),
Publisher: Broadway Books; (July 1997)
ISBN: 0553061739

Complete Windows NT Training Course
by John Deep
Publisher: Prentice Hall PTR; Student edition (August 1998)
ISBN: 0130830410

Designing Interactive Documents
with Adobe Acrobat Pro
by John Deep (Author), Peter Holfelder (Author)
Publisher: John Wiley & Sons; Book and CD-ROM edition (January 11, 1996)
ISBN: 0471127892

Developing CGI Applications with Perl
by John Deep (Author), Peter Holfelder (Author)
Publisher: John Wiley & Sons; (February 1996)
ISBN: 0471141585

Complete Oracle DBA Training Course, The
by Lynwood Brown, Maximilian Mohun, John Deep, Ed Kear
Publisher: Prentice Hall PTR; Book and CD-ROM edition (September 1, 1999)
ISBN: 0130962767

Complete SQL Server 7 Training Course, The
by Jeffry Byrne, Steve Correia, John Deep
Publisher: Prentice Hall; Book and CD-ROM edition (November 3, 1999)
ASIN: 0130868639

Complete MCSE Networking Essentials Training Course
by Jim Keogh, John Deep (Contributor), Ed Kear
Publisher: Prentice Hall PTR; Book and CD-ROM edition (April 15, 1999)
ISBN: 0130847771

UPPER SADDLE RIVER, NJ, April 6, 1998—Prentice Hall is proud to announce the nomination of Pearson Education's Education Group for the prestigious Computerworld Smithsonian Award. The nomination honors the Prentice Hall Professional Technical Reference Multimedia Cyber Classrooms, a CD ROM-based line of Cyber Classroom products.

K. THE ASSOCIATED PRESS – Elderly man, schoolgirl, professor among file-swapping defendants

WASHINGTON / NEW YORK (AP) — The targets of the first lawsuits against music fans who share songs on the Internet include an elderly man in Texas who rarely uses his computer, a Yale University professor, a 12-year-old Manhattan girl and an unemployed woman in New York who says she didn't know she was breaking the law.

Each faces potentially devastating civil penalties or settlements that could cost them tens of thousands of dollars.

The Recording Industry Association of America launched the next stage of its aggressive anti-piracy campaign Monday, filing 261 federal lawsuits across the coun-

try. The action was aimed at what the RIAA described as "major offenders" illegally distributing on average more than 1,000 copyrighted music files each, but lawyers warned they may ultimately file thousands of similar cases.

Durwood Pickle, 71, of Richardson, Texas, said his teenage grandchildren downloaded music onto his computer during their visits to his home. He said his grown son had explained the situation in an earlier e-mail to the recording industry association.

"I didn't do it, and I don't feel like I'm responsible," Pickle said in an interview. "It's been stopped now, I guarantee you that."

Pickle, who was unaware he was being sued until contacted by The Associated Press, said he rarely uses the computer in his home.

"I'm not a computer-type person," Pickle said. "They come in and get on the computer. How do I get out of this?"

Yale University professor Timothy Davis said he will stop sharing music files immediately. He downloaded about 500 songs from others on the Internet before his Internet provider notified him about the music industry's interest in his activities.

"I've been pretending it was going to go away," said Davis, who teaches photography.

Another defendant, Lisa Schamis of New York, said her Internet provider warned her two months ago that record industry lawyers had asked for her name and address, but she said she had no idea she might be sued. She acknowledged downloading "lots" of music over file-sharing networks.

"This is ridiculous," said Schamis, 26. "I didn't understand it was illegal."

She said the music industry shouldn't have the right to sue.

"It's wrong on their part," she said.

An estimated 60 million Americans participate in file-sharing networks, using software that makes it simple for computer users to locate and retrieve for free virtually any song by any artist within moments. Internet users broadly acknowledge music-trading is illegal, but the practice has flourished in recent years since copyright statutes are among the most popularly flouted laws online.

"Nobody likes playing the heavy," said RIAA President Cary Sherman, who compared illegal music downloads to shoplifting. "There comes a time when you have to stand up and take appropriate action."

Sen. Norm Coleman, R-Minn., has already promised congressional hearings into how the music industry has identified and tracked the Internet users it's suing.

"They have a legitimate interest that needs to be protected, but are they protecting it in a way that's too broad and overreaching?" Coleman said. "I don't want to make criminals out of 60 million kids, even though kids and grandkids are doing things they shouldn't be doing."

The RIAA did not identify for reporters which Internet users it was suing or where they live. Lawsuits were filed in federal courthouses in New York City, Boston, Chicago, San Francisco, Dallas and elsewhere.

"Get a lawyer," advised Fred von Lohmann, an attorney for the San Francisco-based Electronic Frontier Foundation. "There's no simpler advice than that, whether you intend to fight this or not. You'll need someone to advise you."

One of the named defendants in the case was Brianna LaHara, who goes to St. Gregory the Great Catholic School on West 90th Street and lives with her mother Sylvia Torres, who plans to fight the suit.

"For crying out loud, she's just a child," Torres said in Tuesday editions of the *Daily News*. She paid $29.99 for the

service three months ago. "If you're paying for it, you're not stealing it, so what is this all about."

About 60 people in New York are said to have downloaded more than 1,000 songs from the service. Each individual sued could be liable for fines starting at $750 and possibly reaching up to $150,000 for each stolen song.

With estimates that half of file-sharers are teenagers, all sides braced for the inevitable legal debate surrounding the financial damage to parents or grandparents. The RIAA named as the defendant in each lawsuit the person who paid for the household Internet account.

"That question will come up immediately, whether a minor can have the requisite knowledge to be the right defendant," said Susan Crawford, who teaches law at Yeshiva University's Cardozo law school in New York City. "A very young child who didn't know what they were doing would be a bad defendant for the industry."

The RIAA also announced an amnesty program for people who admit they illegally share music, promising not to sue them in exchange for their admission and pledge to delete the songs off their computers. The offer does not apply to people who already are targets of legal action.

Sherman called the amnesty offer "our version of an olive branch."

Some defense lawyers have objected to the amnesty provisions, warning that song publishers and other organizations not represented by the RIAA won't be constrained by the group's promise not to sue.

Supreme Court, U.S.
FILED
DEC 3 - 2003
OFFICE OF THE CLERK

No. 03-658

IN THE

Supreme Court of the United States

JOHN DEEP,

Petitioner,

v.

THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. IN SUPPORT OF PETITIONER

Stella B. House, J.D.
221 Old Highway 421
Manchester, KY 40962
606-598-1485
Counsel for Amicus

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

BACKGROUND 2

THE INJUNCTION BELOW 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. Review is Necessary to Resolve the Conflict Among the Circuits 5

II. Review is Necessary to End an Overly Broad Restraint on Freedom of Speech and Association 8

III. Review Is Necessary to Ensure that Lower Courts Will Not Exceed Their Authority by Enjoining Amicus' and the Public's Access to Novel Technologies Having Substantial Non-Infringing Uses 10

CONCLUSION 15

TABLE OF AUTHORITIES

Pages

Cases

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) 6

In re: Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003) 6, 11-13

California Democratic Primary v. Jones, 530 U.S. 567 (2000) 10

Eldred v. Ashcroft, 537 U.S. 186 (2000) ... 10-11, 13

Junger v. Daley, 209 F.3d 481 (6th Cir. 2000) 7

Ruckelshaus v. Monsanto, 467 U.S. 986 (1984) ... 14

Near v. Minnesota, 283 U.S. 697 (1931) 9

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 9

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 9

Roth v. United States, 354 U.S. 476 (1957) 9

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) 6, 8, 11-12, 14

SunTrust Bank v. Houghton Mifflin Co., 252 F.3d 1165 (11th Cir.) (per curiam), *order vacated and opinion substituted*, 268 F.3d 1257 (11th Cir. 2001) 5

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 10

Turner Broadcasting System v. FCC, 512 U.S. 622 (1994) 7

United States v. O'Brien, 391 U.S. 367 (1968) 9

Constitutional and Statutory Authorities

U.S. Const. Amend. V. 14
U.S. Const. Art. I, §8, cl.8. 12
U.S. Const. Art. III, § 2, cl.1. 11
17 U.S.C. §106 12
17 U.S.C. §§302, 304 12
17 U.S.C. §502 12
17 U.S.C. §1201 12
18 U.S.C. § 1839 14
42 U.S.C. §§ 1320d-5, 1320d-6 ..... 12, 14

Other Authorities

Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L.J. 1 (2002) 6. 10
1 Journals of the Continental Congress 108 (1774) 9

No. 03-658

IN THE

Supreme Court of the United States

JOHN DEEP,

Petitioner,

v.

THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

INTEREST OF AMICUS CURIAE[1]

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit organization dedicated to defending the practice of private medicine. Founded in 1943, AAPS publishes a newsletter and journal and participates in litigation in furtherance of its goals of limited government and the free market. Central to the interests of AAPS are the First Amendment rights of association and speech at issue in the

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

case at bar, which are essential to limiting government encroachment on the marketplace of ideas, values, and health. In particular, AAPS is concerned that the suppression of Web sites like Aimster merely for referring internet[2] users to other information or other users is unjustified. The injunction by the court below, if upheld, will likely have a profound chilling effect on the dissemination of important therapeutic medical information to users over the internet.

BACKGROUND

The Aimster.com website offered encryption for users seeking to ensure privacy in the messages they sent to others over the internet. Once users downloaded the program, they could scramble and descramble their messages much like the set-top device does for cable television in millions of homes. The sender of the message would use the program to encrypt or scramble the contents prior to delivering it over the internet to a recipient, who could then decrypt or descramble the contents. The software performing the encryption and decryption resided on the computers of the senders and recipients.

Only the address header of the message would remain unscrambled during this process. The header is necessary for routing the message to the intended recipient. Eavesdroppers, such as foreign governments, would only be able to see the header but could not understand the contents of the message. The usefulness of this technology for protected free speech is obvious and indisputable, particularly in sending messages to victims of totalitarian regimes.

---

[2] The term "internet" is, like "television" and "telephone", a non-trademarked generic name for a pervasive new technology, and thus we follow the growing trend against capitalizing it.

Aimster included features that facilitated its ease-of-use and popularity. For example, Aimster allowed users to establish their own "Buddy List" so that they could send automatically and transparently encrypted messages to each other. Users could also find new "buddies" through an authentication procedure. This encouraged strangers to meet each other over the internet, hold discussions, and share documents in private networks consisting of those who were properly authenticated. This service was similar to AOL's instant messaging service, but more powerful.

Little to no support of users by Aimster.com was needed or offered. Nevertheless, message routers were soon handling up to 100,000 messages per minute, dwarfing even the United States Post Office in volume.

Aimster offered its service to the recording industry, but some responded by suing Aimster to prevent potentially illegal copying of music. The district court enjoined continuation of the service without even holding an evidentiary hearing, and the Seventh Circuit affirmed on novel and untenable legal theories. Without precedent, the Court upheld a broad restraint on free speech based on the argument that Aimster had not suggested a narrower alternative. This violates the First Amendment and conflicts with the rulings in other Circuits. AAPS supports the petition for certiorari by Aimster's owner, John Deep.

THE INJUNCTION BELOW

The decision below affirmed the following injunction:

> Aimster is preliminarily enjoined from directly, indirectly, contributorily, or vicariously infringing in any manner any and all sound recordings and musical compositions (or portions thereof) protected by federal or state law, whether now in existence or

later created, in which Plaintiffs (and any parents, subsidiaries, or affiliates of Plaintiffs) own or control and exclusive right to reproduce, distribute, or transmit ('Plaintiffs' Copyrighted Works')."

Aimster shall immediately disable and prevent any and all access by any person or entity ("User") to any of Plaintiffs' Copyrighted Works available on, over, through, or via any website, server, hardware, software, or any other system or service owned or controlled by Aimster (the "Aimster System and Service"), including, if necessary, preventing any and all access to the Aimster System and Service in its entirety, until such time that Aimster implements measures that prevent any and all copying, downloading, distributing, uploading, linking to, or transmitting of Plaintiffs' Copyrighted Works on, over, through, or via the Aimster System and Service.

(Preliminary Injunction Order at ¶¶1- 2).

SUMMARY OF ARGUMENT

This court below infringed on First Amendment rights in affirming an overly broad injunction against a promising new service. In so doing, the court conflicted with the Sixth, Ninth and Eleventh Circuits. Review is essential here to resolve the conflict and restore the free speech rights of petitioner.

The injunction against petitioner is a prior restraint on free speech that would not and should not survive scrutiny outside of the Seventh Circuit. Without even an evidentiary hearing, petitioner is completely muzzled and prevented from allowing access by others to his innovative software. Like most forms of censorship, the harm extends far beyond the petitioner. Political activists, dissidents, physicians, patients, lawyers and clients alike are injured by the wholesale removal of petitioner's system for encrypted communications.

The potential of 100,000 encrypted messages per minute, made possible by petitioner's Aimster software and network, is enormously positive for the United States and particularly for foreign countries lacking in free speech. The court below, however, suppressed this marvelous innovation before it had a chance to prove its value. The court below invented standards in direct conflict with the other Circuits and inconsistent with the teachings of this Court. The Petition for Writ of Certiorari should be granted.

ARGUMENT

I. REVIEW IS NECESSARY TO RESOLVE THE CONFLICT AMONG THE CIRCUITS.

The decision below conflicts with the Sixth, Ninth and Eleventh Circuits with respect to new technology and prior restraints. The expansive scope of the prior restraint imposed by the Seventh Circuit violated the First Amendment and conflicted with the other Circuits by enjoining the circulation of software to anyone who might use it in a copyright infringing manner. "Aimster shall immediately disable and prevent any and all access by any person or entity ("User") to any of Plaintiffs' Copyrighted Works available on, over, through, or via any ... software." Preliminary Injunction Order at ¶2.

The Eleventh Circuit, when confronted with a prior restraint on publication of *The Wind Done Gone*, initially ruled from the bench that it was "manifest" that the injunction was an "unlawful prior restraint in violation of the First Amendment." *SunTrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165, 1166 (11th Cir.) (per curiam), *order vacated and opinion substituted*, 268 F.3d 1257 (11th Cir. 2001). It later issued a lengthy opinion that adhered to its initial view that the injunction to protect a copyright holder amounted to an unjustified "prior restraint." 268 F.3d at 1277. There, as here, a copyright holder demanded a prior

restraint and the district court had incorrectly overlooked First Amendment concerns in issuing a broad injunction. *See generally* Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L.J. 1 (2002).

The decision below also conflicts with the ruling of the Ninth Circuit in its second *Napster* decision. "[T]he Ninth Circuit erred in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001)." *In re: Aimster Copyright Litigation*, 334 F.3d 643, 649 (7th Cir. 2003). ("*In re: Aimster*") The Seventh Circuit enjoined a promising new technology without any proof of actual knowledge of infringement. This conflicts with the Ninth Circuit and with the ruling of this Court in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony*"). "We are bound to follow *Sony*, and will not impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs' copyrights." 239 F.3d at 1020-21 (citing *Sony*, 464 U.S. at 436, which rejected the proposition that merely supplying the "'means' to accomplish an infringing activity" justifies imposing liability).

The decision below conflicts directly with the *Napster* ruling by the Ninth Circuit in completely enjoining the Aimster software without the requisite knowledge of infringement. The Ninth Circuit held that "absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use, in suggesting that actual knowledge of specific infringing uses is a sufficient condition for deeming a facilitator a contributory infringer." 239 F.3d at 1021 (citing *Sony*, 464 U.S. at 436, 442-43).

The Seventh Circuit expressly held opposite to the Ninth Circuit.

The decision below also conflicts with the Sixth Circuit, which recognized free speech protection for computer software, including encryption. The Sixth Circuit held that "[b]ecause computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment." *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000). In holding in favor of a programmer, it rejected the argument that conjectural harm, even to national interests, justifies regulations on computer software. It applied intermediate scrutiny to restraints on software, allowing restrictions only if "it furthers an important or substantial governmental interest." *Id.* at 485 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). "The government 'must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" 209 F.3d at 485 (quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 664 (1994)).

Finally, the court below conflicted with all other Circuits in holding that petitioner somehow waived his free speech rights by failing to suggest a narrower form of the prior restraint. The lower court declared that petitioner "has waived the objection" to the prior restraint by failing "to suggest alternative language either in the district court or in this court." 334 F.3d at 656. The court conceded that it "cannot find a case that makes this point expressly," but then declares the objection to be waived regardless. *Id.* That new holding is akin to declaring that a criminal defendant waives his right to challenge a lengthy sentence if he failed to propose a less onerous one. No one waives basic rights by refraining from agreeing to a compromise. The very essence of asserting a constitutional right, particularly the right to free speech, is to oppose any infringement.

Congress, not the courts, is the proper venue for addressing new technologies like Aimster. When the video cassette recorder (VCR) was developed and introduced in the market, and widespread unauthorized copying of broadcasts became commonplace, the Supreme Court pointedly refused to interpret the law in a way that would stifle a new technology, saying that only Congress should do that. "Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary." *Sony*, 464 U.S. at 430-31. Later, Congress refused to pass a law limiting the sales or use of VCRs, thereby confirming the wisdom of the Court's forbearance. Here, Aimster has developed a technology facilitating confidential communications, forbearance by the courts is appropriate.

Review is essential here to resolve the conflict among the Circuits over the scope of prior restraints.

II. REVIEW IS NECESSARY TO END AN OVERLY BROAD RESTRAINT ON FREEDOM OF SPEECH AND ASSOCIATION.

Petitioner objected below to the astounding breadth of the injunction, which mandated that "Aimster shall immediately disable and prevent any and all access by any person or entity ("User") to any of Plaintiffs' Copyrighted Works available on, over, through, or via any website, server, hardware, software, or any other system or service owned or controlled by Aimster ...." Preliminary Injunction Order at ¶2. The injunction then shifted the burden to petitioner to "prevent any and all copying, downloading, distributing, uploading, linking to, or transmitting of Plaintiffs' Copyrighted Works on, over, through, or via the Aimster System and Service." *Id.* The court below held, without any precedent or logical justification, that petitioner waived any rights to object to this broad injunction by failing to agree to a narrower alternative. 334 F.3d at 656

This prior restraint on speech is untenable. "Any prior restraint on expression comes ... with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). The injunction against John Deep is an example of a "prior restraints on speech and publication [that is] the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The Supreme Court has emphasized that "it is the chief purpose of the [First Amendment] guaranty to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931). "[A]ll ideas having even the slightest redeeming social importance," such as those concerning "the advancement of truth, science, morality, and arts" enjoy the full protection of the First Amendment. *Roth v. United States*, 354 U.S. 476 (1957) (quoting 1 Journals of the Continental Congress 108 (1774)). *See also United States v. O'Brien*, 391 U.S. 367 (1968).

Many uses of Aimster are inevitably valuable and noninfringing. Visitors to the website who find and copy music lacking any copyright restriction against such use would be engaging in noninfringing activity. The service could be used for any files, not only music, and could even be beneficial in joint efforts to draft legal briefs. Encrypted speech by dissidents in foreign countries is worth protecting and not in violation of respondents' copyrights. The injunction below, however, operates to prevent perfectly lawful activity in addition to arguably infringing activity. The court placed the burden on Aimster to guarantee that no copying, not even fair use copying, can occur without authorization. This impossible standard unnecessarily chills Aimster (and similar websites) from facilitating lawful activity, and thereby constitutes an unconstitutionally overbroad injunction.

Even if there were a compelling interest to restrict the rights of Aimster and its visitors, such restraints

must be narrowly tailored to such interest. *California Democratic Primary v. Jones*, 120 S. Ct. 2402 (2000). "'Regulations imposing severe burdens on [parties'] rights must be narrowly tailored and advance a compelling state interest.'" *Id.* at 2412 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Professor Rubenfeld laments that "[c]opyright law blithely ignores at least three basic principles of free speech jurisprudence that elsewhere go without saying," including the "First Amendment principle ... against prior restraints." *Freedom of Imagination*, *supra*, at 5-6. "In some parts of the world, you can go to jail for reciting a powem in public without permission from state-licensed authorities. Where is this true? One place is the United States of America." *Id.* at 3 (footnote omitted).

Aimster offers remarkable promise for promoting and fostering political dialog, in the United States and under totalitarian regimes in foreign countries. Aimster facilitates communication by email beyond scrutiny by any governmental authority. Enjoining this technology is misguided and obstructs political progress. And if such an attempt is to be pursued, Congress would be the better forum for weighing the various issues and reaching a compromise. Blanket prior restraints against technologies facilitating this speech are unjustified, particularly in the absence of an evidentiary hearing in this case.

III. REVIEW IS NECESSARY TO ENSURE THAT LOWER COURTS WILL NOT EXCEED THEIR AUTHORITY BY ENJOINING AMICUS' AND THE PUBLIC'S ACCESS TO NOVEL TECHNOLOGIES HAVING SUBSTANTIAL NON-INFRINGING USES.

This case further concerns the authority the Constitution assigns to courts to expand the scope of copyrights. Cf. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) ("concern[ing] the authority the Constitution assigns to Congress to prescribe the duration of copyrights") (Id.

at 192). The Constitution assigns Article III courts no such authority, limiting their authority to the resolution of cases and controversies. Const. Art. III, § 2, cl.1. The courts below acted beyond their authority by expanding the scope of plaintiffs'/respondents' copyrights, now to include a novel right to enjoin the distribution of software capable of substantial noninfringing uses. See *In re: Aimster*, 334 F.3d at 645 (affirming a broad preliminary injunction, which had the effect of shutting down the Aimster service); see also *Id.* at 652 (allowing for "the possibility of substantial noninfringing uses of the Aimster system"). Moreover, given this Court's decision in *Sony*, courts have no authority under the Copyright Act to enjoin the distribution of a device capable of substantial noninfringing uses. *See generally Sony*, 464 U.S. 417. By upholding just such an injunction, 334 F.3d at 656, the opinion of the Court of Appeals for the Seventh Circuit contradicts *Sony*. After *Eldred* and *Sony*, it should therefore be a settled question that Congress alone has the authority to expand the scope of copyright, and that courts may not invoke the Copyright Act to enjoin the distribution of devices having substantial noninfringing uses. Because the opinion of the Seventh Circuit ignores and attempts to rewrite settled law, thereby chilling technology development and altering the contours of property rights at the expense of *Amicus* and the public, *Amicus* urges this Court to grant certiorari.

With respect to the proper division of authority that comports with the Constitution, this Court has recently reminded "that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred*, 186 U.S. at 212-213. Congress has seen fit to enumerate a set of exclusive rights belonging to the copyright owner, 17 U.S.C. §106, and has recently adjusted the temporal, 17 U.S.C. §§ 302, 304, and substantive, 17 U.S.C. § 1201, scope of these rights in accordance with the constitutional grant of authority to Congress. U.S. Const. Art.

I, § 8, cl.8. Under the Constitution, then, expansion of this set of rights is the exclusive prerogative of Congress.

In the instant case, copyright owners have sought to enjoin petitioner from distributing petitioner's software, software which is plainly capable of substantial noninfringing uses. *In re: Aimster*, 334 F.3d at 651 (concluding Aimster's file-sharing system "obviously" could be used "in non-infringing ways"). While the Copyright Act grants courts authority to fashion injunctive relief appropriate to the circumstances of the case, 17 U.S.C. § 502, nowhere does the Copyright Act state that the distribution of noninfringing works or devices may be enjoined. Moreover, this Court in *Sony* has limited the authority of courts under the Copyright Act to fashion relief that would enjoin the distribution of devices capable of substantial noninfringing uses. *Sony*, 464 U.S. at 442. The disposition of petitioner's case by the courts below, which have enjoined the distribution of software capable of substantial noninfringing uses, exceeds the constitutional authority of these courts under the Copyright Act as interpreted by this Court in Sony.

The interest of *Amicus* in this urgent issue of national importance should be clear. The privacy of the doctor-patient relationship is so important that Congress has recently seen fit to offer a legislative scheme for ensuring privacy of patient health records. See, e.g., 42 U.S.C. §§ 1320d-5, 1320d-6 (imposing penalties for civil and criminal violations, respectively, involving wrongful disclosure of individually identifiable health information). While *Amicus* is troubled by certain details of the implementation of this scheme, there is no doubt that the privacy interest is one of paramount importance. The software distributed by petitioner enabled its users to engage in encrypted private communications with one another. 334 F.3d at 464 ("All communications back and forth are encrypted by the sender . . . and decrypted by the recipient.").

Members of *Amicus* have occasion every day to engage in private communications with their patients and with one another concerning practical details of health care to be provided these patients. Encryption of such communications ensures a higher and more secure degree of privacy to such communications. A high degree of privacy in these communications is acknowledged to be a social good, and it is merely a question of how best to achieve this good. Petitioner's software offered an elegant and inexpensive way to achieve such privacy, and *Amicus* and the public are now harmed by being deprived of its use due to the far-reaching and constitutionally unauthorized decisions of the courts below.

The interests of *Amicus* and those of the public are in fact closely aligned or identical in certain aspects of the instant case. When deciding whether the *temporal* scope of copyrights was to be expanded, Congress had to consider the effect on third parties, whose rights would be limited by the expansion of such scope. Eldred, 537 U.S. at 206-207. In the instant case, which concerns the *substantive* scope of copyrights, no evidentiary hearing was held, 334 F.3d at 653, which would have offered the court below some understanding of the interests of third parties to be harmed by an overbroad injunction, such as the one which issued and is in controversy here. For privacy reasons, *Amicus* does not know with certainty whether any of its members were users of petitioner's software. However, the number of users of petitioner's software was large enough -- evidently in the millions -- that there is reason to believe that members of *Amicus* may have been users. On this view, members of *Amicus* were communicating with one another in a private encrypted network enabled by petitioner's software, distribution of which is now enjoined by the trial court as affirmed by the Seventh Circuit.

The establishment and maintenance, by members of *Amicus*, of such a private encrypted network, within

which information of value for health care is communicated, constitutes a form of intellectual property. *See, e.g.*, 18 U.S.C. § 1839 (defining "trade secret" as information kept secret and from which economic value is derived by virtue of its being kept secret). There can be no doubt that there is substantial economic value in maintaining the privacy of medical information. *See, e.g.*, 42 U.S.C. §§ 1320d-5, 1320d-6. An injunction such as the one at issue in the instant case, in which distribution of software enabling the privacy of medical information is enjoined, deprives individuals, including members of *Amicus*, of their property while expanding respondents'/copyright holders' rights. The rights of members of *Amicus* and of the public are substantially affected by such injunctions, which is the reason such broad injunctions are disfavored and indeed found, under *Sony*, to be beyond courts' authority to impose under the Copyright Act. See generally *Sony*, 464 U.S. 417. Deprivation of Amicus' members, and of the public, of their property, without notice, or a hearing, or any sort of compensation, exceeds the authority of any agency of government, Const. Amend. V; *see also Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (permitting suit to recover compensation for trade secret compelled to disclose trade secret to government agency), especially a court purporting to act under a statute by which Congress confers limited rights to certain individuals.

Because the courts below have exceeded their authority by enjoining the distribution of software capable of substantial noninfringing uses, and because the interests of Amicus and of the public are harmed by this impermissible injunction, Amicus urges that certiorari be granted in the instant case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Stella B. House, J.D.

Stella B. House, J.D.
221 Old Highway 421
Manchester, KY 40962
606-598-1485
Counsel for Amicus

Dated December 3, 2003

Supreme Court, U.S.
FILED
DEC 3 - 2003
OFFICE OF THE CLERK

No. 03-658

IN THE

Supreme Court of the United States

JOHN DEEP,

Petitioner,

v.

THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* CHARLES LEE MUDD JR., PRESIDENT AND ATTORNEY, PRIVACY INNOVATIONS INC. IN SUPPORT OF PETITIONER

Charles Lee Mudd Jr.
4710 North Virginia Avenue
Chicago, Illinois 60625
773.271.7600
Counsel for Amicus

Date: December 2, 2003

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS 2
TABLE OF AUTHORITIES ii
INTEREST OF AMICUS CURIAE 1
ARGUMENT 2
I. The Rules Advocated By the Court Below Would Undermine This Court's *Betamax* Decision and Thereby Cause Irreparable Harm to the Information Technology and Internet Industries. ... 2
II. Review Is Necessary to Ensure that Lower Courts Will Not Exceed Their Authority by Penalizing Compliance with the ECPA and Other Privacy Related Statutes and Regulations. 7
CONCLUSION 13

TABLE OF AUTHORITIES

Pages

Cases

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) 1, 3

In re: Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003) 3, 4, 8, 10, 11

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) 1, 2, 3, 7

Statutory and Legislative Authorities

17 U.S.C. § 512(i)(2)(A) 6

17 U.S.C. § 1201(c)(3) 5-6

18 U.S.C. §§ 2510, 2511 8

16 C.F.R. 313 9

45 C.F.R. §§160, 164 9

65 Fed. Reg. 101, 33646 9

Other Authorities

Apple Corporation, Press Release, iTune Music Store Hits Five Million Downloads (June 23, 2003) 12

Benny Evangelista, *Download Lawsuit Dismissed; RIAA Drops Claim That Grandmother Stole Online Music*, San Francisco Chronicle, September 25, 2003, at B1 11

Brett Sporich, *DVD Boom Continues*, Billboard, August 16, 2003, at 42. 3

C.J. Alice Chen and Aaron Burstein, *The Law and Technology of Digital Rights Management*, 18 Berkeley Tech. L.J. 487, 491 (2003) 7

Edward W. Felten, *A Skeptical View of DRM and Fair Use*, Communications of the ACM (April 2003) at 57, 58 7

European Union Data Directive 95/46/EC, Article 17 9

Frank Ahrens, *RIAA's Lawsuits Meets Surprised Targets: Single Mother in Calif., 12 Year-Old Girl in N.Y. Among Defendants*, Washington Post, September 10, 2003, at E1 11

Masanobu Katoh, *Intellectual Property and the Internet: A Japanese Perspective*, 2002 U. Ill. J. L. Tech. & Policy 333, 342-347 (2002) 5

Ninth Circuit Appeal Nos. 03-55894 and 03-55901 from Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp.2d 1029, (C.D. Cal. 2003), MGM Plaintiff-Appellants' Opening Brief at 42 ("MGM Brief"); Brief in Support of Reversal by *Amici Curiae* Law Professors and Treatise Authors at 22-23 ("Boorstyn Brief"); Brief of *Amici Curiae* of FullAudio Corp. *et al.* at 17-18 ("FullAudio Brief"); Brief of *Amici Curiae* American Film Marketing Association *et al.* at 14 ("AFMA Brief") 3

S. 2048, the Consumer Broadband and Digital Television Promotion Act 5

Tim Knauss, *Lawsuits Scare Off CNY Music Downloaders*, Syracuse Post Standard, September 14, 2003, at A1 11

INTEREST OF AMICUS CURIAE[1]

This Court in *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984) ("*Betamax*"), and the Ninth Circuit in *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)("*Napster*"), created fair and practical rules for secondary copyright liability. These rules have unleashed the creative powers of the information technology industry and led directly to the growth of the Internet. The court below now seeks to change these rules, and replace them with new standards that would as a practical matter give the entertainment industry a veto power over the development of innovative products and services. This change in the rules would wreck havoc in the information and technology industries, and would harm users of digital information.

Amicus does not condone the infringement that occurs over the Internet in general and peer-to peer networks in particular. However, the misinterpretation of *Betamax* is not the proper solution to this problem. Accordingly, this Court should reject the misreading of *Betamax* urged by the court below.

ARGUMENT

I. The Rules Advocated By the Court Below Would Undermine This Court's *Betamax* Decision and Thereby Cause Irreparable Harm to the Information Technology and Internet Industries.

This case is about more than the legality of peer-to-peer software. It is about the future of the information technology ("IT") industry, the Internet, and the fair use of digital works.

---

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity other than *amicus* or its counsel make a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

The legal foundation upon which the IT industry stands is this Court's decision in *Betamax*. In *Betamax*, this Court proclaimed that the manufacturer of a product could not be held secondarily liable for infringing uses of the product so long as the product was capable of substantial noninfringing uses. That clear standard gave venture capitalists, engineers, and manufacturers the confidence and certainty that they could invest their resources in developing a wide range of consumer IT products without facing copyright liability. These products include personal computers, laptops, scanners, printers, and the software that enables them to operate.

Prior to the sale of these products, the investors and manufacturers have known that consumers could use them to infringe the copyrights in computer programs, computer games, sound recordings, motion pictures, and many literary works. And once the products have been on the market, the investors and manufacturers have known for a certainty that some consumers have in fact used the products for infringing purposes. The investors and manufacturers likewise have known that government and business employees have used their workplace computers to make infringing copies, although perhaps to a lesser degree than their home computers. Nonetheless, under the *Betamax* standard, the investors and manufacturers have also known that they were safe from copyright liability because these products were all capable of substantial noninfringing uses.

In the nearly twenty years since the *Betamax* decision, the IT revolution has created millions of jobs in the U.S. and abroad. It has increased the productivity of businesses, and dramatically enhanced people's ability to access and use information. Although digital technology has exposed the entertainment industry to copyright infringement, it has also benefited the entertainment industry in numerous ways. Computer graphics are routinely used in the production of both live action and animated films and television shows to

make special effects look more realistic. Digital recording technology enables a small number of musicians and technicians to create the sound of an orchestra. Digital storage media such as compact discs and digital versatile discs ("DVDs") provide consumers with previously unimaginable audio and video quality. DVDs have created a huge new market for the picture industry -- $ 11.7 billion in 2002 alone.[2]

The court below contends that the Ninth Circuit, in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)("*Napster*"), misapplied this Court's *Betamax* decision. But the court below also advocates significantly limiting the applicability of *Betamax*, and replacing this Court's holdings in *Betamax* with its own. Indeed, Respondents and their *amici* have already begun to rely extensively on the holdings of the court below – while replacing the holdings of *Betamax* – in briefs filed in closely related Ninth Circuit Appeals from *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp.2d 1029, (C.D. Cal. 2003).[3]

In *Aimster*, Judge Posner explicitly disagreed with the Ninth Circuit in *Napster* and implicitly disagreed with *Betamax*. *Aimster*, 334 F.3d at 649. Judge Posner read into *Betamax* a non-existent cost-benefit test, stating that "when a supplier is offering a product or service that has noninfringing as well as infringing

---

[2] Brett Sporich, *DVD Boom Continues*, Billboard, August 16, 2003, at 42.

[3] *See, e.g.*, Appeal Nos. 03-55894 and 03-55901, MGM Plaintiff-Appellants' Opening Brief at 42 ("MGM Brief"); Brief in Support of Reversal by *Amici Curiae* Law Professors and Treatise Authors at 22-23 ("Boorstyn Brief"); Brief of *Amici Curiae* of FullAudio Corp. *et al.* at 17-18 ("FullAudio Brief"); Brief of *Amici Curiae* American Film Marketing Association *et al.* at 14 ("AFMA Brief"), available at http://www.eff.org/IP/P2P/MGM_v_Grokster/

uses, some estimate of the respective magnitudes of these uses is necessary for a finding of contributory infringement." *Id.* Later, Judge Posner articulated the following rule: "Even when there are noninfringing uses of an Internet file-sharing service ... if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses." *Id.* at 653.

This rule, if adopted nationwide, could cripple the IT industry. In order to avoid copyright liability, a company that marketed a product would have to constantly assess: 1) whether the infringing uses were substantial; and 2) if they were substantial, whether the infringements could be reduced or eliminated in a manner that would not be disproportionately costly. Judge Posner did not define how substantial the infringing uses would have to be, nor how disproportionate the costs of avoiding the infringement. Judge Posner also did not appreciate how costly and technically difficult it can be for a provider of technology products or services to monitor their use and determine whether the use infringed copyright. Since virtually all IT products have some infringing uses, manufacturers and service providers would operate in a perpetual state of uncertainty and confront unending litigation as copyright owners and courts second guessed every engineering decision the manufacturers made.

But if P2P software distributors have a legal duty to use infringement filters, so too do all other software and hardware firms. This rule would require Microsoft to redesign Windows to filter out infringing works and prevent the transmission of infringing material over the Internet. Hewlett-Packard would be forced to reengineer its personal computers to preclude the installation of P2P software. AOL would be required to reconfigure its email and instant messaging service to

inhibit the attachment of files containing infringing works.

In other words, the court below recasts secondary liability as a means of requiring IT companies to implement digital rights management ("DRM") systems. But the court below should not grant what Congress has already denied.

In March 2002, Senator Ernest Hollings of South Carolina, Chairman of the Senate Commerce Committee, introduced S. 2048, the Consumer Broadband and Digital Television Promotion Act. The Hollings bill would have given copyright owners, consumer groups, and the manufacturers of digital media devices twelve months to reach an agreement on "security system standards for use in digital media devices...."[4] If within those twelve months the parties reached an agreement, the Federal Communications Commission ("FCC") would have adopted those standards as a legally binding regulation. On the other hand, if the parties did not reach agreement, the FCC would have been required to initiate a rulemaking proceeding to adopt a standard.

The Hollings bill came under sharp attack from the IT industry, which questioned the bill's assumptions and substance.[5] Additionally, the bill's requirement that IT companies include DRM systems represented a departure from the legislative compromise of Title I of the Digital Millennium Copyright Act ("DMCA"). The IT industry had agreed to the DMCA's prohibition on the

---

[4] Digital media devices were defined broadly enough to include all computers and consumer electronic devices such as CD and DVD players.

[5] For a more detailed discussion of the Hollings bill, see Masanobu Katoh, *Intellectual Property and the Internet: A Japanese Perspective*, 2002 U. Ill. J. L. Tech. & Policy 333, 342-347 (2002).

manufacture of circumvention devices and components only because of the inclusion of the "no mandate clause" in 17 U.S.C. § 1201(c)(3): "Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure...." Notwithstanding this provision, the Hollings bill would have required all digital media devices to respond to the security system standards established pursuant to the legislation.

The Hollings bill also departed from the legislative compromise in Title III of the DMCA. One of the conditions for an Internet service provider to be eligible for the DMCA's safe harbors was that it accommodated and did not interfere with standard technical copyright protection measures that had been developed "pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary multiindustry standards process." 17 U.S.C. § 512(i)(2)(A). A security system developed and mandated by the FCC obviously differs from a consensus standard developed pursuant to a voluntary multi-industry process.

Because of the strong opposition it aroused, the Hollings bill did not progress beyond the Senate Commerce Committee, and it died with the end of the 107th Congress. Congress having refused to reverse its "no mandate" policy judgment in the DMCA, the court below reached essentially the same result by means of expansive application of the secondary liability doctrine.

Should the decision of the court below stand, the entertainment industry will be empowered to dictate to the IT industry how to design its products. To avoid endless cycles of copyright litigation, IT companies will have no choice but to include whatever DRM systems the entertainment industry demands. These DRM sys-

tems could inhibit the functionality of IT products and impede innovation. Additionally, the DRM systems inevitably will diminish users' ability to make lawful copies. This is because it is impossible to design a DRM system that can distinguish between fair uses and infringing uses.[6] Thus, a DRM system that effectively prevents infringing uses will also prevent some fair uses.

In short, the contributory infringement and vicarious liability standards advocated by the court below would fundamentally change the character of the IT industry in this country. Instead of a highly innovative and competitive sector, where new products are rushed to market in an effort to satisfy consumer demand and capture market-share, the IT industry will be regulated by copyright lawyers from the entertainment industry. These lawyers will second guess every engineering decision made by every IT company, and will insist upon DRM systems that limit the many lawful uses recognized by Congress and the courts. This result is precisely what this Court rejected in *Betamax*: enlargement of "the scope of respondents' statutory monopolies to encompass control over an article of commerce that is not subject to copyright protection." *Betamax*, 464 U.S. at 421.

II. Review Is Necessary to Ensure that Lower Courts Will Not Exceed Their Authority by Penalizing Compliance with the ECPA and Other Privacy Related Statutes and Regulations

The opinion from the court below also imposes an unforeseen and unexpected burden upon developers of

---

[6] Edward W. Felten, *A Skeptical View of DRM and Fair Use*, Communications of the ACM (April 2003) at 57, 58; C.J. Alice Chen and Aaron Burstein, *The Law and Technology of Digital Rights Management*, 18 Berkeley Tech. L.J. 487, 491 (2003).

technology and providers of communication services. This burden imposed by the court below involves the balance between advancing privacy enhancing technologies and avoiding the penalties such efforts can now impose. For, the court below has indeed penalized Petitioner for the use of encryption technology. Indeed, the court below chastises and, in fact, penalizes Petitioner for the employment of encryption technology. See *Aimster*, 334 F.3d at 650 (". . . no more can Deep by using encryption software to prevent himself from learning what surely he strongly suspects to be the case: that the users of his service - maybe all the users of his service - are copyright infringers"). While the court below thereafter cushions its edict, the theme remains clear that the court below viewed the use of encryption technology as a means to avoid learning the nature of the communications in which Aimster's users engaged. By doing so, the court below has imposed a burden inconsistent with federal law that elsewhere imposes the obligation to protect the security of communications and refrain from unauthorized interception of electronic communications.

Under the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2510, et seq., any person who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . shall be punished . . . or shall be subject to suit." 18 U.S.C. § 2511. The same penalties would also apply to anyone who disclosed any information knowing that the information may have been obtained through the interception of a covered communication. *See id.* Consequently, Petitioner is precluded under the ECPA from intercepting the electronic communications of those individuals to whom it provides communications services absent some other legal authority. *See id.* Thus, the implied burden imposed upon Petitioner by the court below to learn or be aware of the communications of its subscribers would quite likely violate the

ECPA. *See id.* From the perspective of the ECPA, the use of encryption technology to preclude the interception of the communications by Petitioner and other third parties reflects valiant efforts to comply with the statute's intent. Indeed, such use of encryption seems logical.

In addition to the ECPA, other statutes and regulations promulgated by federal and state legislative bodies impose a burden on certain entities to implement measures to ensure the security of information obtained by and from consumers and customers. While Petitioner likely does not fall within the scope of the Health Information Portability and Accountability Act ("HIPAA"), the use of encryption along with the file-sharing technology could permit physicians and other health care practitioners to utilize the Aimster services to share patient medical information and related files knowing a level of security compliant with HIPAA exists. *See* Standard for Privacy of Individually Identifiable Health Information and Security Standards for the Protection of Electronic Protected Health Information, 45 C.F.R. §§160, 164 (2000-2003). This would also apply to those individuals and entities falling within the scope of the Financial Modernization Act ("Gramm-Leach-Bliley"). *See* Privacy of Consumer Financial Information; Final Rule, 16 C.F.R. 313 (2000); 65 Fed. Reg. 101, 33646 (2000). Without encryption and security enhancing technology, these uses would likely be precluded by privacy and security concerns. Looking to a broader perspective as articulated in the European Union Data Directive 95/46/EC, Petitioner's use of security technology complies with Article 17 of the Directive which requires the implementation of "appropriate technical and organizational measures to protect personal data against . . . unauthorized alteration, disclosure or access, in particular where the processing involves the transmission of data over a network . . . ." Eur. Parl. Direct. 95/46/EC (1995). Again, in this light, the Petitioner's use of encryption seems logical.

The court below counteracts the efforts of privacy initiatives that promote the use of technology that provides for the secure and confidential transmission of electronic communications. By suggesting throughout a substantial portion of the opinion that Petitioner has somehow diminished the viability of its claims by employing the use of encryption technology (most pronounced when described as having caused a "self-inflicted wound"), the court below sends a message to the IT community and developers of communications services that the employment of security technology (eg. encryption) to secure electronic communications diminishes the viability of a defense to potential copyright infringement claims based on alleged conduct of their users and/or subscribers. Indeed, the court below advocates an approach that could easily be interpreted as quite inconsistent with the ECPA and privacy efforts of the last two decades. The court below implicitly advocates the interception and monitoring of electronic communications by Internet Service Providers (perhaps except those that would fall within the protections afforded by the surviving portions of the Communications Decency Act and the Digital Millenium Copyright Act) to avoid potential liability. Moreover, the court below warns that the use of technology to preclude such interception and monitoring of electronic communications may very well be construed against one in defending claims of contributory infringement. Consequently, the opinion of the court below creates a chilling effect on the advancement of privacy enhancing technologies. Such an approach seems illogical.

The court below asserts that Petitioner may have specifically structured his technology so that he could avoid secondary liability for the infringing activities of users of his software, characterizing such a deliberate attempt, if proven, as "willful blindness." *Aimster* at 650-651. *Amici* take no position on this factual dispute. However, *amici* note that there has been no trial and that Petitioner has presented apparently undis-

puted evidence at least of the noninfringing use of his Aimster Internet service for the sale of licensed music, Petition at 5-6.

Nonetheless, the court below correctly recognized that this Court made clear in *Sony* that the manufacturer of a product could not be held secondarily liable for infringing uses of the product so long as the product was capable of substantial noninfringing uses. *In re Aimster*, 334 F.3d at 649 ("The [Supreme] Court was unwilling to allow copyright holders to prevent infringement effectuated by means of a new technology at the price of possibly denying noninfringing consumers the benefit of the technology.").

We understand Respondents frustration with P2P networks and with the *Betamax* and *Napster* decisions. But the secondary liability rules advocated by the court below would cause irreparable injury to the IT industry, Internet companies, and users. In the long run, these rules will also harm Respondents, who will be denied markets that the IT industry otherwise would have created for them.

But Respondents are not powerless to combat infringement over P2P networks. Two recent developments prove the opposite. First, the Recording Industry Association of America (RIAA) has begun to sue individual file traders engaged in large scale infringement. While the RIAA may not have selected all its targets wisely,[7] this strategy appears to have caused a de-

---

[7] *E.g.*, Frank Ahrens, *RIAA's Lawsuits Meets Surprised Targets: Single Mother in Calif., 12 Year-Old Girl in N.Y. Among Defendants*, Washington Post, September 10, 2003, at E1; Benny Evangelista, *Download Lawsuit Dismissed; RIAA Drops Claim That Grandmother Stole Online Music*, San Francisco Chronicle, September 25, 2003, at B1.

crease in file trading.[8]

Second, legal downloads of sound recordings are finally available in a low cost, user-friendly manner. In iTunes' first two months of operation, for example, users downloaded over five million songs for 99 cents a piece.[9] The combination of vigorous enforcement against hard core infringers and attractive business models for legal downloads should solve appellants' problems with P2P networks without crippling the IT industry.

Finally, the court below has improperly burdened the Petitioner by penalizing its use of privacy enhancing technology and reluctance to monitor its users' and subscribers' communications. This burden could significantly affect the development and use of privacy enhancing technologies by the IT industry. In turn, the reluctance to develop and use privacy enhancing technologies will affect consumers negatively. Moreover, the court below has arguably placed its decision before compliance with the ECPA and other privacy related statutes and regulations. Therefore, this Court should reject the approach adopted by the court below."

---

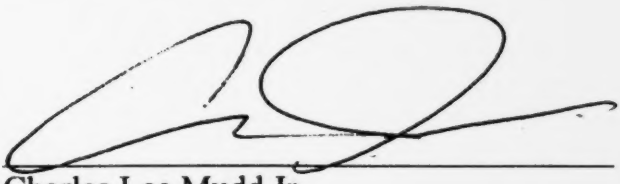
[8] Tim Knauss, *Lawsuits Scare Off CNY Music Downloaders*, Syracuse Post Standard, September 14, 2003, at A1.

[9] Press Release, Apple Corporation, iTune Music Store Hits Five Million Downloads (June 23, 2003).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



Charles Lee Mudd Jr.
Counsel
Member, United States Supreme Court Bar
Admitted 25 June 2001

Supreme Court, U.S.
FILED
DEC 3 - 2003
OFFICE OF THE CLERK

No. 03-658

IN THE

Supreme Court of the United States

JOHN DEEP,

Petitioner,

v.

THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE*
ERIC FLINT, AUTHOR,
IN SUPPORT OF PETITIONER

ROBERT TED PARKER (CA State Bar # 43024)
BERG & PARKER LLP
Four Embarcadero Center, #1400
San Francisco, CA 94111
Tel.: (415) 397-6000
Fax: (415) 397-9449

Counsel for Amicus

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF AMICUS 1
INTRODUCTION AND SUMMARY OF ARGUMENT 2
STATEMENT OF FACTS 4
A. Petitioner's Internet Service Is Obviously Capable of Substantial and Valuable Non-infringing Uses 4
ARGUMENT 9
I. Petitioner's Liability Cannot Turn on an Analysis of the Percentage of Current Use That Constitutes Direct Infringement 9
II. The Provider of Internet Service Should Not Be Required to Monitor His Encryption Technology to Facilitate Enforcement of Copyright by Respondents 13
III. Free Speech and the Public Interest Are Served by Rules That Allow New and Innovative Mediums of Communication to Develop and Flourish 16
CONCLUSION 19

TABLE OF AUTHORITIES

Pages

Cases

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) 11

Ashcroft v. ACLU, 535 U.S. 564 (2002) 3

*Bantam Books, Inc. v. Sullivan,*372 U.S. 58 (1963) 16

In re: Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003)..... 6, 8, 13, 18

Metro-Goldwyn-Mayer Studios v. Grokster, 259 F. Supp. 2d 1029 (C.D. Cal. 2003) 6

Reno v. ACLU, 521 U.S. 844 (1997) 16

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)..... 10, 12, 14, 18

Statutes and Legislative Materials

18 U.S.C. § 2511 15

18 U.S.C. § 2701 15

17 U.S.C. § 512(b) 17

Miscellaneous

Beijing Juggling Internet Expansion and Censorship, The China Post, 3/20/03 7

BigChampagne Is Watching you, Wired Magazine, Issue 11.10, Oct. 2003..... 6

New Technology May Foil PRC Attempts at Censorship Efforts, The China Post, 3/12/03 7

Pornography, Technology and Process: Problems and Solutions on Peer-to-Peer Networks Before the Senate Judiciary Committee, 108th Cong. (9/09/03) 12

Jennifer Lee, *Grass-Roots War Heats Up Against Government Web Blocks,* Chicago Tribune, 10/14/02 7

Chris Nelson, *Upstart Labels See File Sharing as Ally, Not Foe,* N.Y. Times, 9/22/03 5

Jim Rapoza, *Six/Four: The Internet Under Cover,* Eweek from ZDwire 3/06/03 8

Mike Snider, *Anti-Swap CD Hits the Racks,* USA Today, 9/23/03 3

Neil Strauss, *File-Sharing Battle Leaves Musicians Caught in Middle,* N.Y. Times, 9/14/02 5

Ryan P. Winkler, *Preserving the Potential for Politics Online: The Internet's Challenge to Federal Election law,* 84 Minn. L. Rev. 1867 (2000) 7

Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability and the First Amendment,* 88 Geo. L.J. 1833 (2000) 15

No. 03-658

IN THE

Supreme Court of the United States

JOHN DEEP,

Petitioner,

v.

THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

INTEREST OF *AMICUS*

Amicus Curiae Eric Flint (*"Amicus"*) respectfully submits this brief under Rule 37(2)(a)[1] Eric Flint is an author of science-fiction literature who has written nine novels and numerous other works.[2] *Amicus* has

[1] The brief is filed with the written consent of all parties, and was authored in part by Counsel and in part by George David McClure, Jr. of the Kentucky Bar. No person or entity, other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Eric Flint's complete bibliography may be found at http://www.ericflint.net/bibliography.htm.

published some of his works, such as "This Rough Magic," through the Internet library source Baen Books, URL http://www.baen.com. Other such Eric Flint books available through Baen Books are "The Shadow of the Lion," and "Forward the Mage." Through Baen Books, some of *Amicus's* works are available at a minimal cost to readers, without substantial remuneration to *amicus*, but with the promise of enhancing *amicus's* literary reputation and promoting sales of others of *amicus's* works. *Amicus* is concerned that the injunction entered in the court below will have a chilling effect on non-infringing uses of Petitioner's Internet service, such as the sharing of *Amicus's* works between Internet "buddies" who have downloaded one or more of *amicus's* literary works available on Baen.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner offers Internet service that allows users to communicate with their online "buddies" and share file attachments, encrypted by the sender and decrypted by the recipient. Shared file attachments may indeed consist of musical works copyrighted by Respondents, and may thus involve an infringement. But innumerable other files of digital information may be shared through Petitioner's service that involve no infringement, such as books published by *amicus* for dissemination on the Internet. *Amicus* strongly opposes the decision of the court below as overbroad and urge this Court to grant the Petition for Writ of Certiorari.

The court below urges a novel interpretation of contributory infringement that, if adopted, would make all encrypted Internet communications illegal unless the providers agreed to redesign their service and to serve as surrogate copyright enforcers. For the reasons

stated by this Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and for the reasons stated below, *amicus* believes copyright law must be interpreted to preclude the possibility that the development of a new medium of communication could be prohibited simply because it is capable of misuse.

Amicus believes that (1) Petitioner's liability cannot turn on an analysis of the percentage of current use that constitutes direct infringement; (2) authors, innovators and providers should not be required to modify their work or services to facilitate enforcement of copyright by certain copyright holders such as Respondents; and (3) free speech and the public interest would be served by rules that allow new and innovative mediums of communication to develop and flourish.

The First Amendment embodies "our profound national commitment to the free exchange of ideas." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). *Amicus* believes in the free market of ideas and advocates for an educated and highly informed citizenry. This case is not simply about college students who believe that they should not have to pay for music when they can simply download it from the Internet. Rather, at stake in this case is the fundamental issue of whether citizens can be denied valuable technological tools for sharing information and ideas simply because some may use those tools for improper purposes. *Amicus* urges this Court to recognize that the law must not be allowed unduly to impede the non-infringing, socially and commercially valuable uses of new powerful technologies.

STATEMENT OF FACTS

A. Petitioner's Internet Service Is Obviously Capable of Substantial and Valuable Non-infringing Uses.

Amicus here distributes his authored works through libraries, ranging from more traditional brick-and-mortar libraries to Internet-based libraries such as the Baen Library (www.baen.com). These distinctions, however, become less precise in the digital age, as all libraries are relying to a greater degree on the Internet and other forms of electronic communication to provide access to vast amounts of digital material. Accordingly, *amicus* has a strong interest in the outcome of this case because of the potential for non-infringing use of Internet service to share information in such areas as medicine, law, and science; to archive historical documents; and to provide electronic access to a broad range of public domain information, including government documents.

Libraries seek to maximize literacy, education, and entertainment through the free distribution of information. Internet services such as Petitioner's can be of massive assistance in achieving that goal. For example, Project Gutenberg, another Internet library, makes available electronic copies of books that are either in the public domain or whose authors have given their consent. Consequently, there are currently over 9,500 books available through Project Gutenberg.

Still another Internet library, the Internet Archive Project, is an effort to archive the World Wide Web. The amount of material now available through the Internet Archive through a Web-based system is enormous. Approximately 1 terabyte of data is downloaded from the

Internet Archive each day. This would be the equivalent of 200,000 MP3 songs each day. Much of the Internet Archive is text-based material but both the number and percentage of audio and video files are increasing rapidly. All of these audio and video files are non-infringing .

For entities like Project Gutenberg, The Baen Library and the Internet Archive, Web-based distribution of material in such volume can become tremendously expensive and, at a certain point, cost-prohibitive. Specifically, Web-based publishing requires the host to bear the bandwidth costs associated with traffic to and from its site.

For that reason, *amicus* strongly support the use of Petitioner's *buddy-to-buddy* technology, frequently referred to as "peer-to-peer" technology. Petitioner's technology uses messaging and file-attachments to redirect user traffic to online "buddies" using peer computers throughout the electronic community, and ultimately facilitates broad dissemination of information.

Amicus and other producers of copyrighted material also rely on peer-to-peer networks to gain wider distribution of their work. Up-and-coming artists who do not have a large record label promoting their work rely on peer-to-peer technology to create a "buzz" among listeners. *See* Chris Nelson, *Upstart Labels See File Sharing as Ally, Not Foe*, N.Y. TIMES, Sept. 22, 2003, at C1. Likewise, many authors have given Project Gutenberg permission to distribute their work in the hopes of reaching a broader audience. *Amicus* makes this effort through the Baen Library, which makes *Amicus's* works available on the Internet at a minimum cost. Even established artists use messaging and file-attachment technology for commercial purposes. For

example, some well-known musicians encourage their fans to share recordings of live shows to spur attendance at concerts, which are their main source of income (as opposed to royalties). *See* Neil Strauss, *File-Sharing Battle Leaves Musicians Caught in Middle*, N.Y. TIMES, Sept. 14, 2003, at A1.

Moreover, news reports have revealed that Respondents themselves use peer-to-peer programs as a kind of Neilson rating system, counting the popularity of downloads and using that information to guide their decisions about which bands to sign and which CDs to promote. *BigChampagne Is Watching You*, WIRED MAGAZINE, Issue 11.10, Oct. 2003, *available at* http://www.wired.com/wired/archive/11.10/fileshare.html (visited Sept. 26, 2003). They also use it to target regions of the country for promotion when a band or artist is particularly popular in that region. *Id.*

In light of these facts, it is both obvious and undisputed that this technology is capable of numerous non-infringing uses. *See, e.g., Aimster, 344 F. 3d at 651* (the issue is not merely whether the "file-sharing system *could* be used in non-infringing ways, which obviously it could be") and *Id.* at 652 (further explaining that at least five "examples of actually or arguably non-infringing uses of Aimster's service are possibilities"); *see also, e.g. Metro-Goldwyn-Mayer Studios v. Grokster*, 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003) ("it is undisputed that there are substantial non-infringing uses" for file-sharing software). Rather, the court below decides that the amount of infringing use somehow nullifies the importance of these numerous non-infringing uses.

Furthermore, in addition to the non-infringing uses of this technology that are already known, Petitioner's

software is capable of an enormous number of additional non-infringing uses. For example, as political campaigns move on-line, it is likely that candidates will turn to peer-to-peer technology to distribute position papers and campaign videos. *Cf.* Ryan P. Winkler, *Preserving the Potential for Politics Online: The Internet's Challenge to Federal Election Law*, 84 MINN. L. REV. 1867, 1868-71 (2000) (noting the Internet's advantages – *i.e.*, low cost and decentralization – for political activism). Particularly in this context, the cost savings of peer-to-peer distribution would clearly make it a superior alternative to other forms of Web-based political organizing, a phenomenon which itself has only started to take hold. *See id.*

Likewise, people living under totalitarian regimes that censor "unpatriotic" or "inappropriate" websites will be able to access information from anywhere in the world by using peer-to-peer technology.[3] New *Technology May Foil PRC Attempts at Censorship Efforts*, THE CHINA POST, March 12, 2003, *available at* 2003 WL 4136640 (noting that Internet users in mainland China are unable to access information on subjects such as Taiwan, democracy, Tibet, Falun Gong, and major news sites such as CNN and BBC); *see also Beijing Juggling Internet Expansion and Censorship*, THE CHINA POST, March 20, 2003, *available at* 2003 WL 4136745 (recognizing potential of peer-to-peer technology as a way "of circumventing Beijing's prying eye").[4] Among the

---

[3] *See* Jennifer Lee, *Grass-Roots War Heats Up Against Government Web Blocks*, CHICAGO TRIBUNE, Oct. 14, 2002, at 4 (noting that China, Saudi Arabia, Myanmar, Laos, Yemen and the United Arab Emirates are among the countries the engage in Internet surveillance and censorship).

[4] One of the peer-to-peer system currently being used in China is called the "Six/Four System," which refers

documents that have been shared on peer-to-peer networks in China are the Tiananmen Papers, which are a compilation of the transcripts from 1989 meetings among Chinese leaders in the aftermath of the student protests.[5] Although peer-to-peer technology may not provide a foolproof method for avoiding government censorship, it will certainly be much more difficult for totalitarian states to stifle the flow of information on peer-to-peer networks than to block a handful of websites.

The court below also describes the filtering mechanisms in Petitioner's software that permit sharing *only* with buddies. *See Aimster*, 334 F. 3d at 646. (a user may either "designate a buddy or buddies," or "*all* the users of the Aimster system [may] become his buddies"). Using this mechanism, a user who wants to avoid potentially pornographic files, or who fears downloading a virus or other untrusted file can choose to share only with trusted buddies.

Although Petitioner's software does include a filtering mechanism for sharing only with buddies, only the *user* can enable the filter and determine what kinds of files will be screened. But the current technology does not have any method by which Petitioner could override the wishes of the user or block particular files.[6]

---

to the date of the Tiananmen Square massacre on June 4, 1989. *See* Jim Rapoza, *Six/Four: The Internet Under Cover*, EWEEK FROM ZDWIRE, March 6, 2003, *available at* 2003 WL 5734694.

[5] *See* Lee, *supra* note 3.

[6] Even though defendants have no obligation to install filtering software, it is unclear whether they would even be able to develop a program that *only* blocked infringing files. For example, any compulsory filter that

Predictions about the manner in which a new medium of communication will develop are notoriously unreliable. Therefore, Respondents' emphasis on how people are currently using this software is misplaced. Respondents here initially predicted that videocassette recorders would destroy their business. Yet, as we now know, not only did companies like Respondents not suffer, instead they actually experienced a financial windfall due to the development of this new market. For similar reasons, *amicus* believes that peer-to-peer software, if permitted to develop naturally, will increasingly be used for the distribution of additional non-infringing material, in the same manner as *amicus* presently does. As more people become aware of resources like the Baen Library, the Internet Archive and Project Gutenberg, and become aware of the potential of peer-to-peer systems to permit evasion of state censorship schemes, the non-infringing traffic on these user networks will undoubtedly continue to grow. Consequently, *amicus* urges this Court not to close off prematurely the development of a new technology that already has demonstrated such significant non-infringing uses.

ARGUMENT

I. Petitioner's Liability Cannot Turn on an Analysis of the Percentage of Current Use That Constitutes Direct Infringement.

The court below placed tremendous emphasis on its assumption that a very large percentage of the

---

screened out MP3 files would block non-infringing MP3 files as well as infringing ones.

files currently being shared by users of Petitioner's software are infringing. However, the percentage of current uses that are infringing is largely irrelevant as a matter of law. It fails to recognize that non-infringing uses need not be the majority but need only be substantial. It also fails to recognize this Court's holding that the future possibility of non-infringing uses is sufficient for Petitioner here to prevail. Not only is the emphasis by the court below on the percentage of infringing uses wrong as a matter of law, it would lead to results that would harm free speech and the development of new technology. In *Sony*, this Court explained that the pivotal question was whether the Betamax machine was "capable of commercially significant non-infringing uses." *Sony*, 464 U.S. at 442. This Court found that it "need not give precise content to the question of how much use is commercially significant." *Id.* In fact, this Court rested its decision on the fact that the technology was capable of *one* potential use that was non-infringing : timeshifting.[7] *Id.* ("one potential use of the Betamax plainly satisfies this standard, however it is understood: private, non-commercial time-shifting in the home").[8] Accordingly, as the Betamax was "capable of substantial non-infringing uses," this Court ruled that Sony's sale of the product did not constitute contributory infringement. *Id.* at 456. The Ninth Circuit has likewise emphasized that the critical question is not the current uses but whether the software can be used in the future for non-infringing purposes. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001).

---

[7] Time-shifting is the practice of recording programs for viewing at a time other than the time of broadcast. *See Sony*, 464 U.S. at 421.

[8] This Court also acknowledged that the Betamax could be used for authorized recording, another non-infringing use. *See id.* at 443-47.

Amicus discussed other likely future non-infringing uses above. As noted, such non-infringing uses would be likely to increase both in volume and in percentage as users become more familiar with this technology. Considering the millions of file attachments – and countless other communications – presently being conveyed over the Internet, the non-infringing speech taking place on Internet services cannot be dismissed lightly. Contributory infringement liability does not become automatic simply because the percentage of infringing use seems "too high." Regardless of whether a product is used as a means of infringement 90% of the time, 75% of the time, or 40% of the time, the court must focus its attention on the value of the non-infringing uses of the product. If this Court had adopted the approach advanced by the court below, not only would the Sony Betamax have been banned, but video cassette recorders, or CD burners, or DVD recorders could still be banned today so long as a plaintiff showed that these mechanisms are now used for infringing purposes by whatever the magic percentage is determined to be. No developer of a technology that has infringing uses would ever truly be safe from liability. Xerox might be liable for contributory infringement if a certain percent of its copiers were being used to violate copyright law. E-mail might be banned if copyright holders could show that X percentage of e-mails are infringing. Microsoft Word might be banned if copyright holders could show that it is being used X percentage of the time to plagiarize. These are unthinkable outcomes.

Nevertheless, the court below decides, in essence, that when a technology is used primarily for infringing purposes, the non-infringing speech that also relies on the technology can be sacrificed as collateral damage, regardless of its value. Fortunately, this Court has already rejected a rigid "percentages test," *Sony*, 464 U.S. at 491 (Blackmun, J., dissenting) (advocating for

percentages test), and opted instead for a test that focuses on a technology's capacity for non-infringing use. *See id.* at 442. Accordingly, when assessing the value of a technology's non-infringing use, this Court has considered not only the value to the individuals who are actually exchanging files, but has also taken into account the benefits that can accrue to the public at large as a result of the free flow of important information. For example, after the "blaster virus" spread through the Internet, paralyzing those relying on Microsoft operating systems, users of peer-to-peer technology shared files designed to repair the damage and protect other users from infection.[9]

Finally, just as the *Sony* test better preserves the value of non-infringing uses, so too is it more sensitive to the fact that certain uses of technology will ebb and flow over time. The first users of peer-to-peer technology undoubtedly comprised a very specific subgroup of technologically-savvy computer users. But as more people become familiar with file-sharing technology, the percentage of non-infringing use on these networks will undoubtedly increase. Just as the market for rental and sale of pre-recorded videos took time to develop after the Betamax was invented, so too will the non-infringing uses of peer-to-peer technology surely grow over time. Accordingly, the *Napster* Court ruled that the district court erred when it "improperly confined the use analysis to current uses, ignoring the system's capabilities." 239 F.3d at 1021. For all of these reasons, this Court should continue to apply the

---

[9] *See Pornography, Technology and Process: Problems and Solutions on Peer-to-Peer Networks Before the Senate Judiciary Committee*, 108th Cong. (Sept. 9, 2003) (Statement of Alan Morris), *available at* http://judiciary.senate.gov/testimony.cfm?id=902&wit_id=2277 (visited Sept. 24, 2003).

wisdom of the *Sony* decision.

II. The Provider of Internet Service Should Not Be Required to Monitor His Encryption Technology to Facilitate Enforcement of Copyright by Respondents.

Although Petitioner's Internet service is a computer program rather than physical hardware, this is not the relevant distinction. Just as the *Sony* Court found that the sale of a VCR did not create any kind of agency or control relationship between the buyer and the seller, so too should this Court recognize that the sale of a computer program does not transform the consumer and user of the program into an agent whose actions can be attributed to the program's manufacturer. *See In re Aimster Copyright Litigation*, 334 F.3d 643, 654 (7th Cir. 2003) ("The teenagers and young adults who use Aimster's system to infringe copyright are of course not Aimster's agents.").[10]

The control requirement of the vicarious liability standard serves a similar function as the material contribution prong of the contributory liability analysis. In short, a defendant may not be held liable by default; it must have the ability to prevent a third party's infringement before being held secondarily liable for that conduct. Although this Court did not clearly delineate

---

[10] Notably, in *Aimster*, the Seventh Circuit did not affirm the district court's determination that the defendants were also vicariously liable for infringement. 334 F.3d at 654-55. While commenting that it was "less confident" that the plaintiffs would prevail on that claim, the court found that it was unnecessary to "resolve [its] doubts in order to decide the appeal." *Id.* at 654.

the distinctions between vicarious and contributory liability, its decision in *Sony* makes clear that a manufacturer has no duty to alter its technological design to prevent any possible misuse by third parties, so long as substantial non-infringing uses of its technology (as originally designed) exist. *See Sony*, 464 U.S. at 494 (Blackmun, J., dissenting) (arguing in favor of forced modification).

The record is apparently clear that Petitioner developed encrypted Internet service at least for the specific purpose of selling licensed encrypted music in an online retail venture. Still, the court below speculates that Petitioner may have specifically structured his technology so that he could avoid secondary liability for the infringing activities of users of his software, characterizing such a deliberate attempt as "willful blindness."

Whether or not that is true, this Court should recognize the independent virtues of encryption in the realm of electronic communication. Encryption is necessary to the creation and protection of a private instant messaging network. And the protection of private communications over the Internet is a matter of significant public policy to Congress. When Congress amended the Copyright Act in 1998 through the Digital Millennium Copyright Act ("DMCA"), it expressly sought to ensure that personal privacy for Internet communications would not be diminished. *See* 17 U.S.C. §§ 512(m), 1205. Indeed, the DMCA legislative history suggests that passage of the anti-circumvention provisions of the Act would "substantially enhance the degree to which individuals may protect their privacy as they work, play and communicate on the Internet." S.Rep. No. 105-190 at 18 (1998). In addition, the privacy of Internet communications is protected through the Electronic Communications Privacy Act, which

prohibits unauthorized interception or access of electronic communications. 18 U.S.C. §§ 2511, 2701.

Furthermore, a requirement of mandatory monitoring or control, coupled with ever expansive secondary infringement liability, may result in dramatically increased, and in many cases, overly zealous censorship by companies that are far more interested in avoiding liability than preserving non-infringing speech. *See* Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability and the First Amendment*, 88 GEO. L.J. 1833, 1871 (2000).

Furthermore, as noted earlier, encryption does facilitate communication with citizens in countries whose governments actively oppose free speech as a matter of official policy. *See supra* at 12-13. Forcing software companies to incorporate methods to monitor users and choke points to control the flow of information will only make it easier for the governments in China, Saudi Arabia and other totalitarian regimes to clamp down on speech with which they disagree. Therefore, notwithstanding Respondents' insistence that all technology developers should be required to modify their products to maximize surveillance and control, this Court should not ignore the fact that such a rule would come at the expense of the free speech and expression protected by our Constitution and international human rights norms.

In light of the virtues of encryption in the electronic realm, this Court should not mandate that technology designers incorporate a particular level of surveillance and control over users of its products.

III. Free Speech and the Public Interest Are Served by Rules That Allow New and Innovative Mediums of Communication to Develop and Flourish.

Amicus certainly does not condone the violation of copyright law. But the interests of individual copyright holders should not be allowed to eviscerate other crucial protections of the First Amendment. *See Harper & Row Publishers, Inc. v. Nation Enterps.*, 471 U.S. 539, 582 (1985) (observing that limitations on copyright are appropriate when necessary to "ensure consonance with our most important First Amendment values"). The First Amendment creates a strong presumption in favor of speech and against regulations that would operate as prior restraints on speech. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."). The decision below turns this presumption on its head by suggesting that the abuses committed by some of those who use Internet service can justify cutting off all other users, including those who are engaging in valuable and constitutionally protected speech.

This Court has noted that electronic communication allows "any person with a phone line . . . [to] become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). This is particularly true for peer-to-peer messaging technology, which facilitates pure speech to a greater degree than virtually any other technology available today. Therefore, just as with the Internet, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* Accordingly, the non-infringing communication that takes place on these user networks is entitled to full constitutional protection.

As explained *supra*, Petitioner's technology provides users with an easy and inexpensive way to communicate with each other. Particularly for digital libraries and other entities devoted to public education and the free flow of information, peer-to-peer technology provides the most cost-effective and in some cases the only feasible alternative for accomplishing their mission. Likewise, there are many who use this technology for valid commercial reasons, such as product promotion and distribution, and market research. Whereas Web-based publishers incur significant and increasingly prohibitive costs for bandwidth and storage, peer-to-peer systems allow the data to remain with individual members of the network, spreading out storage costs and dispersing web traffic throughout the network. In fact, in many ways, peer-to-peer technology serves the same purposes and provides the same benefits as system caching,[11] a practice which Congress recognized as valuable and chose to accommodate in the Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860, codified at 17 U.S.C. § 512(b).

Respondents are essentially asking this Court to shut down technology unless it conforms to specifications dictated by copyright holders. Although copyright law certainly bestows significant rights upon copyright holders and is itself an important mechanism for promoting valuable speech, Respondents have no right to veto new technology simply because it may enable oth-

---

[11] "System caching" is the process whereby a computer system or network automatically makes a temporary copy of material provided to it by a third party "for the purpose of making the material available to users of the system or network who . . . request access to the material from the [third party]." 17 U.S.C. § 512(b)(1).

ers to violate their rights.[12] Such a rule would run fundamentally counter to the interests of the public, whose well being depends on scientific advances and technological breakthroughs.

As this Court made clear in *Sony*, so long as a technology is capable of substantial non-infringing uses, a court may not effectively ban the technology simply because some have chosen to abuse its capabilities. *See Napster*, 239 F.3d at 1021 ("To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use."); *In re Aimster*, 334 F.3d at 649 ("The [Supreme] Court was unwilling to allow copyright holders to prevent infringement effectuated by means of a new technology at the price of possibly denying non-infringing consumers the benefit of the technology."). Petitioner's technology is obviously capable of numerous valuable non-infringing uses. Accordingly, Petitioner is entitled to the protections of *Sony*, and Respondents' contributory and vicarious infringement claims against him should properly be rejected.

---

[12] Respondents obviously have every right to include reasonable copy control protections on their songs and videos. In fact, some artists have already begun experimenting with such techniques. *See* Mike Snider, *Anti-Swap CD Hits the Racks*, USA TODAY, Sept. 23, 2003, at D6.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

BERG & PARKER LLP

By: Robert Ted Parker

Robert Ted Parker
CA State Bar # 43024

Berg & Parker LLP
Four Embarcadero Center, #1400
San Francisco, CA 94111
Tel.: (415) 397-6000
Fax: (415) 397-9449

Counsel for Amicus

Dated December 2, 2003